86 1280

Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

vs.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

W. J. MICHAEL CODY
Attorney General and Reporter
JOHN KNOX WALKUP
Chief Deputy Attorney General
FRANK J. SCANLON
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1963

R. TIM WURZ
Assistant Attorney General

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

90 pp

QUESTIONS PRESENTED

1. Did the United States Department of Energy (DOE) violate the rights of the State of Tennessee under the Nuclear Waste Policy Act of 1982 (NWPA) in refusing to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a (first-of-its-kind) facility to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants?

2. *When* does the NWPA require DOE to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a nuclear waste storage facility?

(A) Does the NWPA require consultation and cooperation with Tennessee *when* DOE evaluates the suitability of areas in Tennessee for a nuclear waste storage facility?

(B) Or does the NWPA require consultation and cooperation *only* upon completion of DOE's planning process and *after* Congress authorizes site-specific, design-specific plans to construct the facility in Tennessee?

3. In light of the clear congressional mandate that DOE engage in "meaningful" consultation and cooperation with potential host states for proposed nuclear waste storage facilities, did the Court of Appeals misapply *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by deferring to a DOE interpretation of the NWPA that calls for consultation and cooperation with Tennessee only *after* congressional authorization of DOE's proposed site-specific, design-specific plan to construct a facility in Tennessee?

4. Do the District Courts or the Courts of Appeals have original and exclusive jurisdiction over lawsuits arising out of 42 U.S.C. § 10161?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	9
This Court Should Review A Misapplication Of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), By The United States Court of Appeals For The Sixth Circuit Which Renders Meaningless DOE's Duty Under The NWPA To Consult And Cooperate With Tennessee In Determining The Suitability Of Areas In Tennessee For A Nuclear Waste Storage Facility	9
Conclusion	13
Certificate of Service	14
Appendix:	
A - Opinion of the United States Court of Appeals for the Sixth Circuit, November 25, 1986	A-1
B - Opinion of the United States District Court for the Middle District of Tennessee, November 26, 1985	A-26
C - Opinion of the United States District Court for the Middle District of Tennessee, February 5, 1986	A-43
D - 42 U.S.C. § 10137	A-76
E - 42 U.S.C. § 10139	A-80
F - 42 U.S.C. § 10161	A-82
G - Order of the United States Court of Appeals for the Sixth Circuit, January 7, 1987	A-88

TABLE OF AUTHORITIES

Cases Cited:

Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985) 10

Chevron, USA, Inc. v. Natural Resouces Defense Council, Inc., 467 U.S. 837 (1984) 7, 9, 10, 11, 12

Japan Whaling Association v. American Cetacean Society, ____ U.S. ____, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) 10

Merrell Dow Pharmaceuticals, Inc. v. Thompson, ____ U.S. ____, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) . 10

Tennessee v. Herrington, 622 F.Supp. 923 (M.D. Tenn. 1985) 1, 5

Tennessee v. Herrington, 626 F.Supp. 1345 (M.D. Tenn. 1986) 1, 5, 6, 12

Tennessee v. Herrington, No. 3-85-0959 (M.D. Tenn. Feb. 7, 1986) (Permanent Injunction) 6

Tennessee v. Herrington, 806 F.2d 642 (6th Cir. 1986) .. 1, 7, 8, 10, 11

United States v. Riverside Bayview Homes, Inc., ____ U.S. ____, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) .. 10

Statutes Cited:

Federal:

28 U.S.C. § 1254(1) 2

42 U.S.C. §§ 10101, *et seq.* 2

42 U.S.C. § 10101(18) 3

42 U.S.C. § 10131(a) 2

42 U.S.C. § 10131(b) 3

42 U.S.C. § 10132 3

42 U.S.C. § 10133 3

42 U.S.C. § 10134 3

42 U.S.C. § 10135 3

42 U.S.C. § 10136 3

42 U.S.C. § 10137 ..... 2, 3, 4

42 U.S.C. § 10137(b) 3, 4, 6

42 U.S.C. § 10138 3

42 U.S.C. § 10139 ..... 2, 5

42 U.S.C. § 10139(a) 4, 7

42 U.S.C. § 10139(c) 5

42 U.S.C. § 10143 3

42 U.S.C. § 10151(a) 2

42 U.S.C. § 10161 ..... 2, 3, 5

42 U.S.C. § 10161(a) 2

42 U.S.C. § 10161(b) 2

42 U.S.C. § 10161(h) 3, 4, 5, 10, 11, 12

42 U.S.C. § 10222 2

Miscellaneous:

Cong. Rec. S. 15641 (December 20, 1982) 11

Cong. Rec. S. 15642 (December 20, 1982) 12

Cong. Rec. S. 15668 (December 20, 1982) 12

Mission Plan for the Civilian Radioactive Waste Management Program, U.S. Department of Energy, June 1985 9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

vs.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, the sovereign State of Tennessee, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 25, 1986.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (reprinted in the Appendix at A.1) is reported at 806 F.2d 642 (6th Cir. 1986). The opinion of the Sixth Circuit Court of Appeals reviews two opinions of the United States District Court for the Middle District of Tennessee (reprinted in the Appendix at A.26 and A.43) which are reported at 622 F.Supp. 923 (M.D. Tenn. 1985) and 626 F.Supp. 1345 (M.D. Tenn. 1986).

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 25, 1986, and this Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Nuclear Waste Policy Act of 1982, P.L. 97-425, 42 U.S.C. §§ 10101, *et seq.* Applicable portions of the Act, 42 U.S.C. § 10137, 42 U.S.C. § 10139 and 42 U.S.C. § 10161 are reprinted in the Appendix at A.76, A.80, and A.82.

STATEMENT OF THE CASE

At issue in this case is whether the United States Department of Energy (DOE) violated the rights of the State of Tennessee in preparing a proposal to construct a facility in Tennessee to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants. Development of a proposal for the facility, known as a Monitored Retrievable Storage facility or MRS, is authorized by 42 U.S.C. § 10161 of the Nuclear Waste Policy Act of 1982, P.L. 97-425, 42 U.S.C. §§ 10101, *et seq.* (NWPA).[1] Section 10161(b) directs DOE to develop an MRS proposal and submit it to Congress for authorization to construct the facility. The proposal must include "site-specific designs, specifications, and cost estimates sufficient to. . . solicit bids for the construction of the first such facility. . .." *Id.*

---

[1] The NWPA represents a comprehensive scheme to dispose of the spent fuel and high-level radioactive waste being generated by the nation's civilian nuclear power plants. 42 U.S.C. § 10131(a), 42 U.S.C. § 10151(a), and 42 U.S.C. § 10161(a). The cost of implementing the NWPA is paid by the "Nuclear Waste Fund" which in turn is funded by fees assessed nuclear power generators. 42 U.S.C. § 10222. The heart of the NWPA is DOE's authorization to take title to the nuclear

The proposed MRS first announced by DOE in April of 1985 is a billion dollar, permanent, multi-structured facility to be located on a 1,100-acre site near Oak Ridge, Tennessee. DOE's proposal calls for shipment to the MRS, by truck and train, of spent nuclear fuel rods now being stored at some 80 nuclear power plants around the country. Once at the MRS, the fuel rods will be unloaded from shipping casks, consolidated with other fuel rods and placed in larger storage casks. The casks will be stored indefinitely at the MRS for eventual shipment of the spent fuel to a permanent, deep geologic repository site to be constructed in either Nevada, Texas, or Washington. *See* 42 U.S.C. § 10132.

On August 20, 1985, the State of Tennessee filed suit in the United States District Court for the Middle District of Tennessee seeking to enjoin DOE from presenting the MRS proposal to Congress. Specifically, Tennessee alleged that DOE, in preparing the proposal, violated 42 U.S.C. § 10161(h) and § 10137(b) of the NWPA. These provisions require DOE to "consult and cooperate" with Tennessee officials regarding the public health and safety, environmental, and economic impacts of an MRS if the agency studies areas in the State to determine their suitability for an MRS.[2] Tennessee's suit was prompted by

---

waste now stored at individual nuclear reactor sites and bury it in a deep geologic repository. 42 U.S.C. § 10101(18), 42 U.S.C. § 10131(b) and 42 U.S.C. § 10143. The NWPA does not designate the repository location but establishes a complex process for its identification and presentation to Congress for approval. 42 U.S.C. § 10132 — § 10138. This siting process is replete with provisions for participation at every stage by potentially-affected states. The NWPA also empowers DOE to study the feasibility of constructing one or more MRS facilities and to submit a proposal for such facilities to Congress. 42 U.S.C. § 10161. Unlike the deep geologic repository, however, the MRS will store waste in ground-level receptacles for further use, processing, or disposal.

[2] 42 U.S.C. § 10161(h) incorporates by reference into the planning process for the MRS, certain procedures elsewhere in the NWPA which, on their face, are applicable to the process of determining the

the release of a massive 1,500 page study identifying three Tennessee sites, including the chosen Oak Ridge site, as suitable for an MRS. The study, which constitutes an integral part of DOE's congressional proposal, was prepared with absolutely no input from Tennessee officials or citizens. Indeed, Tennessee was completely unaware of the study or DOE's interest in locating an MRS in the State until that study was completed and released in final form.

In response to Tennessee's Complaint, DOE acknowledged its responsibility to consult and cooperate with affected states under the NWPA, yet admitted it had not done so with respect to its site selection study of Tennessee. DOE argued it was not required under § 10161(h) to engage in the consultation and cooperation process until *after* Congress authorized construction of a specific MRS facility at a particular Tennessee location.[3] The District Court, in ruling on the parties' cross Mo-

---

location of a deep geologic repository. *See* n. 1, *supra*. Section 10161(h) provides, in pertinent part, as follows:

> Any [MRS] facility authorized pursuant to this section shall be subject to the provisions of. . . [section 10137]. . .. For purposes of carrying out the provisions of this subsection, any reference in. . . [section 10137]. . . to a repository shall be considered to refer to a monitored retrievable storage facility.

Thus, § 10137(b), when read in conjunction with § 10161(h), provides:

> In performing any study of an area within a State for the purpose of determining the suitability of such area for a [MRS]. . ., the Secretary shall consult and cooperate with the Governor and legislature of such State. . . in an effort to resolve the concerns of such State. . . regarding the public health and safety, environmental, and economic impacts of any such [MRS].

[3] DOE first moved to dismiss Tennessee's Complaint on grounds that original and exclusive jurisdiction of all lawsuits arising under the NWPA was vested in the Courts of Appeals by virtue of 42 U.S.C. § 10139(a). (A.80). In anticipation of DOE's jurisdictional challenge, Tennessee, on October 18, 1985, filed in the Court of Appeals for the Sixth Circuit, a protective Complaint identical to the one filed in the District Court in order to toll the 180-day statute of limitations under

tions for Summary Judgment on February 5, 1986, soundly rejected DOE's interpretation of § 10161(h). The Court determined that adherence to DOE's position would completely frustrate Congress' intent that the states be afforded a meaningful role in the site selection process. *Tennessee v. Herrington*, 626 F.Supp. 1345, 1359 (M.D. Tenn. 1986). (A.70).

While recognizing the ambiguity of § 10161(h) as to when consultation and cooperation is required under the NWPA, the Court found a clear congressional intent that DOE consult and cooperate with Tennessee during the planning process *prior* to congressional authorization of an MRS.[4] Accordingly, the

---

§ 10139(c). (A.81). *See* Sixth Circuit No. 85-3859. The District Court, on November 26, 1985, denied DOE's Motion to Dismiss, ruling that § 10139 of the NWPA, though vesting original and exclusive jurisdiction in the Courts of Appeals for *some* actions under the NWPA, did not apply to actions arising out of 42 U.S.C. § 10161 relative to an MRS. *Tennessee v. Herrington*, 622 F.Supp. 923 (M.D. Tenn. 1985) (A.26). DOE perfected an interlocutory appeal of this jurisdictional ruling to the Court of Appeals on January 9, 1986. *See* Sixth Circuit No. 86-5087.

[4] The dispute over when DOE must consult and cooperate with Tennessee is occasioned by the ambiguity in the meaning of "authorize" in § 10161(h). Section 10161(h) "triggers" the consultation and cooperation process when a facility is "authorized by this section [10161]." DOE interprets this language to mean a facility "authorized by Congress." Under such an interpretation, consultation and cooperation can occur only after Congress determines that an MRS will be built, where it will be built, and how it will be built. The District Court, however, ruled that common sense and the legislative history of the Act require an interpretation of "authorized" to mean a facility "generally contemplated for study and development by the Secretary." *Tennessee v. Herrington*, 626 F.Supp. 1345, 1359 (M.D. Tenn. 1986). (A.69). Thus, a potential host state may be involved in the development of an MRS proposal and in the attempt to alleviate any public health and safety, environmental, or economic concerns raised by the project.

Court found the MRS proposal for Tennessee "fatally flawed" and declared that DOE could not submit it to Congress absent compliance with the consultation and cooperation requirements of the NWPA. *Id.* at 1347. (A.45). In the words of the Court:

> This Court declares, without hesitation, that the Secretary has failed to carry out the statutory duties assigned to him. The Secretary has taken very few steps to achieve the clear purposes of the statute, which envisions that the states be granted the broadest possible rights in participating in the development of MRS facilities and in gaining the public's trust in the federal waste management program.

Id. (A.45).

On February 7, 1986, it became uncertain whether DOE would comply with the District Court's declaratory ruling. The Court was compelled, therefore, to issue a permanent injunction prohibiting DOE from presenting its MRS proposal to Congress absent compliance with the Court's ruling.[5]

---

[5] The Order of the Court setting forth the injunction provides as follows:

> On February 7, 1986, the State of Tennessee submitted an affidavit to the Court, which states that the United States Department of Energy ("DOE") has indicated to the State that the DOE intends to violate the declaratory judgments of this Court, which were issued February 5, 1986. Based upon this affidavit, the Court permanently enjoins the DOE from making any proposal to Congress or filing any documents with Congress which rely on siting studies developed prior to consultation and cooperation between the DOE and the State of Tennessee, pursuant to 42 U.S.C. § 10137(b).
>
> This permanent injunction is issued at 2:29 p.m., February 7, 1986.

Tennessee v. Herrington, No. 3-85-0959 (M.D. Tenn. Feb. 7, 1986) (Permanent Injunction).

DOE appealed the District Court's declaratory judgment and injunction to the Sixth Circuit Court of Appeals. On November 25, 1986, a three-judge panel of that Court, in a split opinion, adopted DOE's interpretation of the NWPA and ruled it did not have to consult and cooperate with Tennessee until after congressional authorization of an MRS in Tennessee. *Tennessee v. Herrington,* 806 F.2d 642 (6th Cir. 1986) (Wellford, J., dissenting). (A.1).[6] The majority bottomed its ruling on *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), wherein this Court held it appropriate, under narrowly defined circumstances, to defer to an agency's interpretation of an ambiguous statute which that agency must administer.[7]

In a vigorous dissenting opinion, Judge Wellford echoed the ruling of the District Court that the majority's interpretation of the provisions of the Act was at odds with the clear congressional intent regarding consultation and cooperation. Judge Wellford found that allowing consultation and cooperation only after congressional authorization of an MRS is both "unreasonable and unacceptable." In the words of the dissenting judge:

---

[6] The appeal (No. 86-5168) was consolidated with the pending interlocutory appeal (No. 86-5087) of the District Court's jurisdictional ruling and the original action (No. 85-3859) filed by Tennessee in the Sixth Circuit under 42 U.S.C. § 10139(a). *See* note 3, *supra.*

[7] The Court of Appeals also ruled, this time unanimously, that, under § 10139(a), original and exclusive jurisdiction of Tennessee's action was in the Court of Appeals and not the District Court. Though not specifically stated by the Court of Appeals, it is obvious from the opinion that the Court reached the substantive question regarding consultation and cooperation in the context of the Complaint filed by the State of Tennessee (No. 85-3859) invoking the jurisdiction of the Court of Appeals under § 10139(a).

> The majority adopts the Agency interpretation of the several provisions in controversy as 'rational' and therefore controlling in view of the Act's inherent ambiguity. I am disposed, however, to the view that this interpretation, which allows the state to be consulted only *after* Congress has authorized the site, limits the state to such a restricted role that this interpretation is unreasonable and unacceptable in light of expressed legislative intent and other statutory language.

Tennessee v. Herrington, 806 F.2d at 654. (A.24-25).

A subsequent Motion for a Rehearing En Banc was denied by the Court on December 31, 1986. Nevertheless, the Court, on January 7, 1987, granted Tennessee's request for a stay of the mandate pending the filing of this Petition in order to prevent the "important issues" of this case of first impression from becoming moot.[1]

---

[1] A copy of the Court's Stay Order is set forth in the Appendix at A.88.

REASONS FOR GRANTING THE WRIT

This Court Should Review A Misapplication Of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), By The United States Court Of Appeals For The Sixth Circuit Which Renders Meaningless DOE's Duty Under The NWPA To Consult And Cooperate With Tennessee In Determining The Suitability Of Areas In Tennessee For A Nuclear Waste Storage Facility.

This Court should hear this case for two reasons. First, the issues in this case significantly impact the important national goal of safely and effectively disposing of the nation's spent nuclear fuel. Second, the Court of Appeals misapplied *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and set a dangerous precedent as to when the federal courts must defer to an administrative agency's interpretation of federal law.

In the first instance, the issues in this case run to the very heart of the serious national problem of safely and effectively disposing of the spent fuel generated by the nuclear power industry.[9] This is so because the consultation and cooperation process is integral to the NWPA's overall plan to ensure that an MRS is a safe and effective component of the nation's nuclear waste disposal program. By engaging in meaningful consultation and cooperation, DOE can facilitate the identification and resolution of health, safety, economic, and environmental problems associated with developing an MRS. The benefits to the

---

[9] The problem is occasioned by the sheer volume of extremely dangerous waste which is accumulating at some 80 reactor sites around the country and which will remain a threat to the country's health and environment for generations to come. DOE estimates that civilian nuclear power plants will generate by the year 2000 approximately 50,000 metric tons of uranium waste. *See Mission Plan for the Civilian Radioactive Waste Management Program*, U.S. Department of Energy, June 1985, Vol. 1, p. 4.

nation as a whole from the proper implementation of this cooperative process are obvious. A less-than-satisfactory application of the process could deal a serious blow to the ultimate solution of this national concern. As Judge Wellford stated in his dissent from the Sixth Circuit's decision not to review Tennessee's Complaint *en banc:*

> The decision in this case not only resolves a serious dispute for the State of Tennessee in its efforts to protect its environment and citizens, but will have important ramifications for the whole process of selecting nuclear waste disposal sites in the United States. It represents the first appellate consideration of a substantial portion of the Nuclear Waste Policy Act.

Tennessee v. Herrington, 806 F.2d at 655. (A. 25).

By interpreting 42 U.S.C. § 10161(h) of the NWPA to require consultation and cooperation *only* after Congress authorizes construction of a site-specific, design-specific facility, the Sixth Circuit Court of Appeals has rendered the consultation and cooperation process meaningless. Tennessee's input on such important matters as the MRS's safety and environmental impact will be of little or no value once the facility's design and location have been decided.

Moreover, the Sixth Circuit's erroneous interpretation of when DOE must consult and cooperate with Tennessee under § 10161(h) is predicated upon a misapplication of the doctrine of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., supra.* Under *Chevron* and its progeny,[10] courts must

---

[10] *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson,* ____ U.S. ____, 106 S.Ct. 3229, 3244, 92 L.Ed.2d 650 (1986) (Brennan, J., dissenting); *Japan Whaling Association v. American Cetacean Society,* ____ U.S. ____, 106 S.Ct. 2860, 2867-2868, 92 L.Ed.2d 166 (1986); *United States v. Riverside Bayview Homes, Inc.,* ____ U.S. ____, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 125 (1985); *Id.* at 152 (Marshall, J., dissenting).

defer to an agency's construction of a statutory provision it administers when the language in question is ambiguous *and* when the intent of Congress is not clear. If, however, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843.

The Sixth Circuit majority, in an attempt to resolve the conceded ambiguity of § 10161(h) as to when DOE must consult and cooperate with Tennessee, ignored the clear legislative intent in the NWPA. Instead, the majority undertook an analysis of allegedly conflicting goals of the NWPA to resolve § 10161(h)'s ambiguity. Based upon this analysis, the majority, relying upon *Chevron,* deferred to DOE's interpretation of § 10161(h). The Court stated its analysis as follows:

> [T]he Act and its legislative history suggest that Congress had two conflicting goals: it wanted to provide the states with a meaningful role in the development of disposal facilities, but, as discussed in Part II *supra,* it also wanted to ensure the timely development of an MRS proposal. Adoption of the State's position would defeat the second goal, though it would further the first. The DOE's interpretation, on the other hand, would further the second goal, while impeding the first. In such an instance, we must adopt the DOE's position.

Tennessee v. Herrington, 806 F.2d at 653. (A.21).

The majority's opinion fails to recognize Congress' overriding intent to ensure that consultation and cooperation with potential host states is both extensive and meaningful.[11] Ob-

---

[11] Just prior to passage of the NWPA, the Act was amended to add what is now 42 U.S.C. § 10161(h). Cong. Rec. S. 15641 (December 20, 1982). In commenting on this amendment, Senator McClure stated:

> Full state participation is provided for the MRS program in ex-

viously, if such quality interaction with Tennessee is to occur, the State must be involved in the decision-making processes before a final site for an MRS is chosen and before a design-specific plan for construction of the facility is presented to Congress. The Sixth Circuit's deference to DOE's interpretation of § 10161(h) thus violates the letter and the spirit of the *Chevron* decision[12] and frustrates a clearly expressed congressional intent.

---

actly the same way as it is provided in the case of repository sites.

Cong. Rec. S. 15642 (December 20, 1982) (remarks of Senator McClure). Also in support of the amendment was Senator Kasten who argued that this and other amendments would give states "a strong role in nuclear waste siting decisions." He further stated:

> The Department of Energy cannot be allowed to build a disposal facility without giving the states a meaningful role in the siting and construction decisions.
>
> A long-range nuclear waste disposal program is critical to our nation's energy future, and. . . the proper role of states in the siting of disposal facilities is critical to the success of this program. The only successful nuclear waste disposal program will be one which matches national policy needs with local citizens' concerns.

Cong. Rec. S. 15668 (December 20, 1982) (remarks of Senator Kasten).

See also Tennessee v. Herrington, 626 F.Supp. at 1356-1359, for a thorough analysis of this aspect of the legislative history of the NWPA. (A.63-70).

[12] The wisdom of deferring to DOE's interpretation of any ambiguous provision of the NWPA must be seriously questioned. The agency's relationship to the Act differs from that of other agencies to the statutes they are entrusted to administer. Generally, an agency enforces a regulatory scheme governing private industries or interests. Under the NWPA, DOE itself is the entity to be regulated. To allow the agency to determine how the statute will apply to its own actions and decisions removes the impartial adjudicator envisioned by the administrative agency system.

CONCLUSION

For the reasons set forth above, the petitioner respectfully requests that a Writ of Certiorari issue to reveiw the judgment and opinion of the United States Court of Appeals for the Sixth Circuit decided and filed November 25, 1986, to determine when DOE is required to consult and cooperate with Tennessee as required by 42 U.S.C. § 10161(h) and 42 U.S.C. § 10137(b) of the NWPA in developing plans for an MRS in Tennessee. The petitioner further requests the Court to review the Court of Appeals' ruling that the Courts of Appeals and not the District Courts have original and exclusive jurisdiction over suits arising under 42 U.S.C. § 10161.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General and Reporter
State of Tennessee

JOHN KNOX WALKUP
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1963

R. TIM WURZ
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit has been forwarded to the below-listed counsel via first-class U.S. Mail, postage prepaid, on this the 4th day of February, 1987:

Hon. John S. Herrington
Secretary of the United States Department of Energy
James Forrestal Building
1000 Independence Ave., S.W.
Washington, D.C. 20585

Hon. Charles Fried
Solicitor General
United States Department of Justice
Constitution Ave. & 10th Street
Washington, D.C. 20530

FRANK J. SCANLON
Deputy Attorney General

APPENDIX

APPENDIX A

Nos. 85-3859, 86-5087, 86-5168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Tennessee,
Plaintiff-Appellee
(Nos. 86-5087, 86-5168),
Petitioner (No. 85-3859),

v.

John Herrington, Secretary of Energy,
Defendant-Appellant
(Nos. 86-5087, 86-5168),
Respondent (No. 85-3859).

On Petition to Review an Order of the
Department of Energy, and On Appeal from
the United States District Court for the
Middle District of Tennessee.

Decided and Filed November 25, 1986

Before: KENNEDY and WELLFORD, Circuit Judges; and BROWN, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which BROWN, Senior Circuit Judge, joined. **WELLFORD, Circuit Judge, delivered a separate opinion cncurring in part and dissenting in part.**

KENNEDY, Circuit Judge. This case presents for review two issues of statutory construction: (1) whether the federal courts of appeals have original jurisdiction to review the actions of the Secretary of Energy ("Secretary") regarding his compliance with the consultation and cooperation requirements of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §10101 *et seq.* ("NWPA" or "Act") with respect to Monitored Retrievable Storage ("MRS") facilities; and (2) whether the NWPA requires the Secretary to consult with any state before he sends Congress his proposal for the location and construction of one or more MRS facilities. We hold that the federal courts of appeals have original jurisdiction over actions involving the consultation and cooperation requirements applicable to MRS facilities under the NWPA. We further hold that the NWPA does not require the Secretary to consult with any state before he sends Congress his proposal for the location and construction of one or more MRS facilities. Accordingly, we reverse the District Court's holding that it had original jurisdiction and dismiss the petition for review of the Secretary's action.

I. BACKGROUND

A. The NWPA

The NWPA was passed by Congress and signed into law on January 7, 1983. The Act was designed to provide for the establishment of "programs for the development of repositories for the safe permanent disposal of high level nuclear waste and spent fuel, and to provide for the safe stabilization and long-term protection of sites for the disposal of law level radioactive waste." H.R. Rep. No. 491, Part I, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792, 3792 [hereinafter cited as H.R. Rep. No. 491, *reprinted in* 1982 U.S. Code Cong. & Ad. News]. Title 42 U.S.C. § 10224(a) creates an Office of Civilian Radioactive Waste Management in the Department of Energy ("DOE" or "Department") to ad-

minister the Act. Section 10222[1] establishes a Nuclear Waste Fund, funded by fees assessed the generators of the waste, to pay the costs of implementing the Act. This case is concerned only with Subchapter I of the Act, which deals with the actual disposal and storage of high-level radioactive waste, spent nuclear fuel and low-level radioactive waste.[2]

Subchapter I of the Act is divided into three parts. Part A authorizes and requires the DOE to construct a "permanent deep geologic disposal" facility or "repository" for high-level radioactive waste and spent nuclear fuel. 42 U.S.C. §§ 10101(18). 10131(b). Part B provides for an interim storage program for temporary storage of limited amounts of spent nuclear fuel. 42 U.S.C. §§ 10151, 10555(a), (e). Part C, which is the subject matter of this litigation, authorizes the Secretary to study the concept of MRS and to develop plans for MRS as an alternative plan for the long-term storage of nuclear waste in the event that Congress determines at a future date that such facilities are needed. The DOE is required to study the feasibility and practicality of constructing one or more MRS facilities and to submit a proposal to Congress detailing its findings. 42 U.S.C. § 10161. Although the construction of permanent repositories is automatically authorized by the NWPA, *see* 42 U.S.C. § 10131(b). Congress by law must explicitly authorize construction of an MRS facility. *See* 42 U.S.C. § 10161(b), (c)(2), (f).

---

[1] All references to sections in this opinion are to sections of Title 42 of the U.S. Code.

[2] Subchapter II of the Act deals with research, development and demonstration regarding disposal of high-level radioactive waste and spent nuclear fuel. Subchapter III sets forth various administrative provisions relating to radioactive waste, such as provisions establishing the Nuclear Waste Fund and the Office of Civilian Radioactive Waste Management.

The MRS system, if adopted by Congress, would serve as a "back-up" to the repository program. H.R. Rep. No. 491, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 3810. As described in the Act, the purpose of MRS is:

> (A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;
>
> (B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;
>
> (C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and
>
> (D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

42 U.S.C. § 10161(b)(1). Section 10161 of the Act contains all of the express provisions relating to MRS. However, section 10161(h) also makes several of the sections and subsections of Part A of Subchapter I dealing with the participation of states and Indian tribes in the selection of sites for permanent repositories applicable to the MRS siting process.[3]

The NWPA provides that "[o]n or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more [MRS] facilities for high-level radioactive waste and spent nuclear fuel." 42 U.S.C. § 10161(b)(1). The Secretary is required to include certain items in his proposal, *see* 42 U.S.C. § 10161(b)(2) and (4), and he is required to consult with the Nuclear Regulatory Commission and the Environmental Protection Agency in formulating his proposal. 42 U.S.C. § 10161(b)(3).

---

[3] *See* footnote 7 *infra.*

B. The Study

Pursuant to the congressional directive in the NWPA, the DOE undertook a study of the feasibility of MRS as an option for the storage of spent nuclear fuel. This study resulted in a document entitled *The Need for and the Feasibility of Monitored Retrievable Storage—A Preliminary Analysis ("Need and Feasibility Analysis")*, which concluded that an MRS facility would significantly improve the overall operation of the nuclear waste management system.

The DOE then set out to idenfity potential sites for the MRS facility. After a lengthy study, which is described in a second report, *Screening and Identification of Sites for a Proposed Monitored Retreivable [sic] Storage Facility ("Screening and Identification Study")*,[4] the DOE determined that the preferred

---

[4] The DOE used a multi-step process in selecting the preferred site for an MRS facility. The DOE first considered five factors in isolating the potential sites: (1) locations which would minimize total shipment miles; (2) the DOE's ability to judge the suitability of the site for development of a nuclear facility; (3) availability of sufficient acreage; (4) potential to compete with known land use, environmental or other public objectives; and (5) sites at which an MRS facility could be most successfully deployed.

The DOE intially looked at the first factor above and decided that an MRS facility should be located in the East-Central region of the United States. (The DOE's conclusions were reported in *Sitting of an MRS Facility: Identification of a Geographic Region That Reduces Transportation Requirements.*) The DOE then applied the second factor, choosing to limit potential sites to lands owned by the DOE and used for nuclear activities or sites docketed with the Nuclear Regulatory Commission for development of production and utilization facilities. This resulted in the identification of 37 sites located in 12 states. The DOE then eliminated all sites which did not contain at least 1,100 available acres. This reduced the number of potential sites to 11 sites in 6 states. These sites were then analyzed with respect to eight factors:

> (1) ease of regulatory compliance; (2) existing environmental setting; (3) geotechnical site characteristics; (4) socioeconomic setting and changes which might be induced by MRS development;

site was the Clinch River Breeder Reactor site, which is owned by the Tennessee Valley Authority. The DOE Oak Ridge Reservation and the Hartsville Nuclear Plant site were selected as alternatives. All three sites are located in the state of Tennessee ("the State").

On April 25, 1985, the director of the Office of Civilian Radioactive Waste Management of the DOE formally notified Tennessee Governor Lamar Alexander by letter that the DOE had completed its initial evaluation of potential MRS sites and that three candidate sites had been identified in Tennessee. The letter stated that the DOE's next step would be to complete evaluation of the sites and to prepare the proposal for submission to Congress on January 15, 1986. The letter also stated that the DOE intended "to provide Tennessee with funds, information and technical assistance to gain an understanding of the impacts of siting an MRS within its jurisdiction and, subsequently, to form independent opinions regarding MRS acceptability." Joint Appendix at 85.

The DOE announced its MRS proposal in the Federal Register the next day, stating that Tennessee was the preferred location for the facility. *See* 50 Fed. Reg. 16536, 16537 (1985). The announcement stated that copies of the *Screening and Iden-*

---

(5) institutional and administrative structure of the state; (6) local transportation characteristics; (7) access to physical infrastructure (e.g., utilities); and (8) capital cost of construction.

Screening and Identification Study at 9. The DOE's evaluation was published in a three-volume report, *Monitored Retrievable Storage Facility Site Screening and Evaluation Report "Screening and Evaluation Report"*. The DOE concluded from this analysis that all 11 sites were acceptable. The DOE then tried to anticipate various problems that might arise with developing an MRS facility at each of the sites, including the potential for delay. Finally, DOE officials attempted to identify the sites at which they believed an MRS facility could most successfully be constructed. The DOE eliminated two sites from consideration and selected the three Tennessee sites as being the most preferable candidate sites. The DOE's final evaluations were set forth in the *Screening and Evaluation Report.*

tification Report and the *Need and Feasibility Analysis* were available to the public and solicited public comment on the latter by July 1, 1985. The DOE also requested that states, affected Indian tribes and the public submit available information which might be useful in preparing the environmental assessments by July 1, 1985.

In the ten months between this announcement and the finalization of the DOE proposal in February, 1986, the DOE further analyzed the three selected sites. The DOE provided Tennessee with a $1.2 million grant to assist the State in its independent evaluation of the MRS system. On August 9, 1985, the State requested a 90-day review of the final MRS proposal. The DOE responded that it was unable to provide the materials 90 days before the scheduled submittal date of January 15, 1986, and that it wanted to avoid delaying the submission to Congress if at all possible. Submission of the DOE proposal was delayed from January 15 to February 6, and then to February 10, for other reasons, however. On January 21, 1986, the Governor announced the State's position on the MRS facility. The State's comments were officially transmitted to the DOE on February 5, 1986.

The DOE intended to submit its proposal and the State's comments to Congress on February 10, 1986. As a result of the litigation described below, however, this information has not yet been submitted.

C. The Litigation

The State filed a complaint with the United States District Court for the Middle District of Tennessee on August 20, 1985, challenging the legality of the DOE's proposal for construction of an MRS facility in Tennessee. The complaint requested, *inter alia,* a declaratory judgment that the DOE failed to follow the state "consultation and cooperation" process required under section 10137 of the Act in identifying Tennessee as a can-

didate for MRS facilities.[5] The State also requested that the District Court enjoin the DOE from presenting the proposal for an MRS to Congress absent compliance with section 10137. On October 22, 1985, the State filed a Motion for Partial Summary Judgment on this cause of action.

The DOE filed a Rule 12(b) Motion to Dismis on October 21, 1985, arguing that the District Court lacked subject matter jurisdiction. The DOE argued that section 10139 of the NWPA vests exclusive and original jurisdiction in the United States courts of appeals over all matters arising under the Act. The State argued that the Act vests original jurisdiction over some disputes under the Act with the courts of appeals, but that this jurisdiction does not extend to disputes concerning development of an MRS under section 10161.

Following oral argument on November 12, 1985, the District Court ruled from the bench and denied the Motion to Dismiss. At the same time, the District Court authorized an immediate appeal of its ruling to this Court pursuant to 28 U.S.C. § 1292(b). The District Court entered a written Memorandum and Order on the jurisdictional issue on November 26, 1985. *Tennessee v. Herrington,* 622 F. Supp. 923 (M.D. Tenn. 1985) (denial of motion to dismiss). This Court granted the DOE's petition for permission to appeal on January 9, 1986.

Section 10139(c) of the Act requires that suits be filed with the court of appeals within 180 days of the action, or lack thereof, giving rise to the suit. To prevent the statute from running while the jurisdictional dispute was being resolved, the State filed a Complaint for Declaratory Judgment and Injunctive Relief with this Court on October 18, 1985.

---

[5] The State also alleged certain constitutional deficiencies in the process described in the Act for the congressional approval of an MRS proposal submitted by DOE. The State did not move for summary judgment on this basis, nor did it seek any other type of ruling on this claim. Therefore, this issue is not before this Court.

On February 5, 1986, on cross-motions for summary judgment, the District Court granted partial summary judgment to the State on Count One of its complaint. *Tennessee v. Herrington,* 626 F. Supp. 1345 (M.D. Tenn. 1986). The District Court found that the language of section 10161(h), which incorporates section 10137 and its cooperation and consultation requirements, was ambiguous. The District Court agreed with the State that the Act was intended to require DOE consultation with the State before the proposal was submitted to Congress, not after congressional authorization as argued by the DOE. On February 7, 1986, the District Court granted a permanent injunction prohibiting the DOE from making any proposal to Congress or filing any documents with Congress which rely on siting studies developed prior to consultation and cooperation between the DOE and the State.

On February 25, 1986, this Court granted the DOE's motion to consolidate and expedite. Thus, the DOE's interlocutory appeal of the District Court's jurisdictional ruling (No. 86-5087), the State's original complaint in this Court for declaratory judgment and injunctive relief (No. 85-3859) and the DOE's appeal of the District Court's declaratory judgment and permanent injunction (No. 86-5168) were consolidated. On March 6, 1986, another panel of this Court denied the DOE's request for summary reversal of the District Court's declaratory judgment and permanent injunction. It also denied the DOE's request for a stay of the District Court's permanent injunction.

II. JURISDICTION

The first question that this Court must answer is whether the federal district courts or the federal courts of appeals have original jurisdiction over disputes arising under section 1016(h) of the NWPA. We find that the United States courts of appeals have such original jurisdiction.

The NWPA's provisions on judicial review are unclear. Section 10139(a) of the Act provides that the federal courts of ap-

peals shall have original and exclusive jurisdiction over certain actions arising under the Act. This section states in relevant part:

> (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action—
>
> > (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part:
> >
> > (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part
> >
> > . . . .

42 U.S.C. § 10139(a). Section 10139 is located in Subchapter I, Part A, of the Act. Facially, then, these subsections of section 10139(a) refer only to actions arising under Subchapter I, Part A. The provisions relating to MRS, on the other hand, are located in Subchapter I, Part C, of the Act.[6]

Section 10161(h), however, makes certain sections and subsections of Part A dealing with review of site selection and state and Indian tribe participation and consultation in the permanent repository context applicable to MRS facilities as well[7]

---

[6] Section 10139(a) also makes actions arising under Subchapter II of the Act and review of certain environmental impact statements and environmental assessments subject to the jurisdiction of the courts of appeals. The only other explicit reference to judicial review in the NWPA is section 10201, which makes research and development activities under Subchapter II subject to the provisions of section 10139.

[7] Section 10161(h) states:

> Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135 [dealing with review of repository site selection], 10136(a) [requiring notification of affected states and Indian tribes of potential sites], 10136(b) [re-

Section 10161(h) does not expressly state that MRS facilities are subject to the jurisdiction provisions of section 10139(a). However, the provisions listed in section 10161(h) are subject to the original jurisdiction of the courts of appeals when they apply to permanent repositories.

The DOE argues that actions arising under section 10161(h), at least to the extent that the DOE's conduct is required because of the incorporation of sections found in Part A of the Act, are subject to the original jurisdiction of the courts of appeals in accordance with the provisions of section 10139(a). The State, on the other hand, argues that, since section 10139 is not specifically mentioned in section 10161(h), such actions are subject to the original jurisdiction of the district courts. The District Court examined this issue and concluded that it had original jurisdiction over matters arising under section 10161(h). *Tennessee,* 622 F. Supp. at 931. We disagree.

Because the statute is ambiguous on its face, we look to the relevant legislative history and the statutory structure as a whole to determine Congress' intent. We note first that the legislative history of the NWPA is silent as to Congress' intent regarding jurisdiction over matters arising under section 10161(h). However, the overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions. For example, the Act requires federal agencies to submit a written report to the Secretary and to Congress explaining any failure to meet a project decision schedule for any repository. *See* 42 U.S.C. § 10134(e)(2). The Act directs federal officials to issue any authorizations necessary for the repository program

---

quiring state participation in repository siting decisions], 10136(d) [requiring that the governor of the stae be notified when Indian tribes are affected], 10137 [requiring consultation with states and affected Indian tribes], and 10138 [requiring participation of Indian tribes] of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

"at the earliest practicable date." 42 U.S.C. § 10140(a)(1). The Act sets forth specific dates for repository site selection, 42 U.S.C. § 10134, completion of a mission plan scheduling major steps. 42 U.S.C. § 10221, and the initial acceptance of nuclear waste, 42 U.S.C. § 10222. The Act imposes a 180-day deadline for commencement of judicial review, 42 U.S.C. § 10139(c).

The Act and its legislative history reveal the same desire for timely completion of the MRS study and proposal. The NWPA as enacted is a compromise between the House and Senate bills. The House bill originally required development of an MRS proposal within five years of enactment of the statute. H.R. 3809, 97th Cong., 2d Sess. § 141(b)(1982). The Senate bill, on the other hand, would have required development of the proposal within one year after enactment. S. 1662, 97th Cong., 2d Sess. § 502 (1982). Congress compromised on a due date of two and one-half years.[8] 42 U.S.C. 10161(b). Senator Johnston explained the compromise as follows:

> If MRS is to become an alternative to the main program of irreversible geologic disposal of nuclear waste, we would at least like to know that the MRS approach will be "on the table" at approximately the same time the Nation is seriously considering specific geological disposal sites. This timing could become especially important if, for some unforeseen reason, the repository program runs into any snag. In this eventuality, we would want the option to be available to move to MRS: [sic] if only on an interim basis.
>
> To accomplish this it was essential that the House bill be amended. That bill provided that Congress would not even see the MRS proposal until 5 years after the enactment of the act—presumably in 1988. But this is well past

---

[8] The DOE has, of course, missed this deadline. That fact has no bearing on our interpretation of Congress' intent regarding judicial review, however.

> the time when, under the provisions of the House bill, the commitment to a specific geological site would already be made.

128 Cong. Rec. 15664 (1982) (statement of Sen. Johnston).

Thus, Congress clearly intended that the development of the MRS proposal proceed in as timely a fashion as the development of the permanent repositories. Compared to the permanent repository process, the MRS proposal process has been streamlined in several ways. The site characterization process applicable to repositories, *see* 42 U.S.C. § 10133, does not apply to MRS. MRS sites do not require presidential review or recommendation as do permanent repositories. *See* 42 U.S.C. § 10132(c). Although section 10136(c) provides for financial assistance to states affected by the repository site selection process, section 10161(h) does not make this assistance available to states affected by the MRS siting process. Indeed, such states are entitled to impact assistance only after Congress has authorized construction of a facility within the state. 42 U.S.C. § 10161(f). Section 10134(f) requires that the Secretary prepare a final environmental impact statement to accompany any recommendation to the President to approve a permanent repository site. Section 10161(c)(1), on the other hand, requires that the Secretary prepare only an environmental assessment to submit to Congress with the MRS proposal. A full environmental impact statement is not required until after Congress has authorized construction of an MRS facility, 42 U.S.C. § 10161(c)(2). Section 10141(a) empowers the Administrator of the Environmental Protection Agency to promulgate specific regulations regarding permanent repositories; the Administrator has no such power over MRS facilities.

Finally, H.R. Rep. No. 491, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792, reveals Congress' desire that the development of a MRS proposal proceed with as much speed as the actual development of a final repository system. The Report states:

> The Committee notes that although there is substantial confidence that the repository development program represented by the Committee amendment will provide safe facilities in a timely manner, it is not possible to resolve all uncertainties or predict all obstacles. The potential for failure or serious delay in the program exists. Monitored Retrievable Storage may be required in the event of failure or long-term delay of the repository development program. Indeed, this need for insurance that some safe technology will be available when nuclear reactors begin being decommissioned is the Committee's primary basis for recommendation of the detailed planning for an MRS program included in the Committee amendment to H.R. 3809.

Id. at 3810. An MRS proposal cannot provide the back-up insurance desired by Congress unless it proceeds in the same timely fashion as the development of the permanent repository program. Accordingly, Congress must have intended the same jurisdictional provisions to apply to both permanent repositories and MRS, rather than allowing the MRS proposal to be delayed by lengthy, repetitive litigation.

Moreover, adoption of the States position on jurisdiction would create an inconsistency in the application of the Act. The provisions listed in section 10161(h) are clearly subject to the original jurisdiction of the courts of appeals when they are being applied to repositories. The State's interpretation of the Act would permit both the district courts and the courts of appeals to review those actions when they are taken in connection with MRS facilities even though the Act clearly prohibits such duplicative review in the deep geological repository process. Since the Act evidences Congress' intent of timely implementation of all of its provisions, "such a seemingly irrational bifurcated system." *Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193, 197 (1980) (footnote omitted), should not be attributed to the Act absent clear congressional intent to the contrary. *See*

also Florida Power & Light Co. v. Lorion, ____ U.S. ____, 105 S. Ct. 1598, 1606 (1985) (quoting *Crown Simpson Pulp Co.*, 445 U.S. at 197). We find no such clear congressional intent here.

Although the issue of jurisdiction presented here is one of first impression, the Court of Appeals for the District of Columbia Circuit determined in an analogous case that original jurisdiction vested in the courts of appeals. *General Elec. Uranium Mgmt. Corp. v. United States Dept. of Energy*, 764 F.2d 896 (D.C. Cir. 1985) [hereinafter cited as *GEUMCO*], addressed the question of whether the courts of appeals or the district courts had original jurisdiction over lawsuits brought by power companies contesting fees assessed against them by the DOE under section 10222 of the NWPA. This section, a part of Subchapter III of the Act, creates a fund financed by nuclear power plants to pay for activities under the Act. Section 10139(a) does not explicitly apply to section 10222. Nonetheless, the Court of Appeals found that it has original and exclusive jurisdiction over actions arising out of section 10222.

In determining whether original jurisdiction lies in the courts of appeals, we must be governed by Congress' intent, "not by any views we may have about sound policy." *Florida Power & Light Co.*, ____ U.S. at ____, 105 S.Ct. at 1608 (citation omitted). Nonetheless, policy considerations are relevant in cases such as this where Congress' intent is ambiguous. *Cf. GEUMCO*, 764 F.2d at 903. We find the policy considerations relied upon by the *GUEMCO* Court in finding original jurisdiction in the courts of appeals over actions arising under section 10222 persuasive in the context of actions arising under section 10161(h) as well.

The *GUEMCO* Court noted first the general principle in administrative appeals that " 'where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter.' " 764 F.2d at 903 (quoting *Denberg v. United States R.R. Retirement Bd.*, 696

F.2d 1193, 1197 (7th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984)). The Court noted that vesting "exclusive jurisdiction in the court of appeals avoids duplicative review and the attendant delay and expense involved." 764 F.2d at 903 (footnote omitted).

Second, the *GEUMCO* Court noted that that case did not require factual findings of a nature more suited to district court determination. We find the same to be true in the MRS siting process. The District Court found below that: "If original jurisdiction over MRS actions was vested in the court of appeals, the Court of Appeals for the Sixth Circuit would be compelled to hear proof in this case on the issue of whether or not the Secretary of Energy followed the proper statutory procedures in identifying sites in Tennessee as candidates for MRS installations." *Tennessee,* 622 F. Supp. at 931. The burden of developing this record is no greater than that posed by our having original jurisdiction in the sitting process for permanent repositories. Since Congress saw fit to give us the responsibility in the one instance, we cannot conclude that the burden was too great for them to have intended in the other.

Finally, the *GEUMCO* Court noted that "original and exclusive jurisdiction in the courts of appeals promotes the congressional goals of efficiency and predictability" in dealing with the pressing national concern about the safe disposal of nuclear waste. 764 F.2d at 904. The Court found it "hard to believe that Congress intended to have any of the basic issues surrounding disposal of [spent nuclear fuel] to be tied up in duplicative litigation for years on end." *Id.* As the Court noted:

> Nuclear reactors must be refuelled periodically at which time the [spent nuclear fuel] must be removed and stored. There is already a tremendous accumulation of [spent nuclear fuel] in short-term facilities with limited capacity. Consequently, nuclear facilities may well have to be shut down in the near future, and the matter of establishing safe and adequate disposal facilities is an acknowledged global problem of dramatic urgency.

Id. (footnote omitted). Given Congress' desire to develop a timely proposal for MRS as an alternative means for addressing the problem of disposal of spent nuclear fuel and radioactive waste, we cannot conclude that Congress would have intended both the District Court and this Court to have jurisdiction over this matter.

Accordingly, we find that actions arising under section 10161(h) of the NWPA are subject to the judicial review provisions of section 10139.

III. CONSULTATION AND COOPERATION REQUIREMENT

The NWPA poses a second question of statutory construction for this Court: when do the consultation and cooperation requirements of section 10137 take effect in the MRS siting process? We adopt the Secretary's interpretation of the Act and find that the consultation and cooperation requirements apply in the MRS setting only after congressional authorization of the proposal.

Section 10161(h) states: "Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title." Thus, this section attempts to incorporate most of the state participation requirements applicable to permanent repositories into the MRS setting (sic) process.[9] Section 10161(h) states that all

---

[9] A brief description of the permanent repository siting process is useful in understanding the following discussion. Section 10136(a) requires the DOE to identify, within 90 days of the passage of the NWPA (January 7, 1983), an unspecified number of "potentially acceptable" repository sites. Within 90 days thereafter, the DOE is required to notify the governor, the legislature and any affected Indian tribe in any state affected by the identification, 42 U.S.C. § 10136(a). The DOE must "nominate" 5 sites as suitable for a repository using certain guidelines. 42 U.S.C. § 10132(b). The DOE must then choose 3 "candidate" sites and submit them to the President for approval. 42

references to "repository" in the incorporated sections are to be replaced by "MRS" for the purposes of this section. The key provision among those enumerated in section 10161(h) for the purposes of this litigation is section 10137(b), which states:

> In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading [sic] any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

This provision creates the "consultation and cooperation" requirements at issue here.

U.S.C. § 10132(b)(1)(B). The President must review the sites in accordance with 42 U.S.C. § 10132(c). If presidential approval is forthcoming, the sites will be subject to "site characterization" under 42 U.S.C. § 10133. Then the DOE selects one of the 3 sites and recommends it for construction of the permanent repository. 42 U.S.C. § 10134(a). Unless the site is successfully challenged in Congress by the disapproval process described in §§ 10136(b) and 10135, the DOE is free to construct the repository.

The DOE has two separate obligations to consult and cooperate with an affected state in this process. Section 10137(b) requires the DOE, "[i]n performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c)," to consult and cooperate with such state. Section 10137(c) requires the DOE to attempt to negotiate a consultation and cooperation agreement "[n]ot later than 60 days after (1) approval of a site for site characterization for such a repository under section 10132(c)...or (2) the written request of the State...notified under section 10136(a)...."

By their language none of the provisions listed in section 10161(h), including section 10137(b), becomes applicable until the MRS facility has been "authorized." This litigation centers around the meaning of that term. The DOE argues that "authorized" in section 10161(h) means "authorized by Congress" so that the consultation and cooperation requirements of section 10137 do not apply until Congress has determined to go forward with the MRS program and has approved the construction of an MRS facility. The State, on the other hand, argues that "authorized" means a facility being studied by the DOE for presentation to Congress, so that consultation and cooperation must occur before congressional consideration and approval of the project. The District Court found that "[t]he legislative history and the statutory language of the NWPA dictate the conclusion that the provisions incorporated in section [10161(h)], must be given effect prior to Congressional authorization of MRS construction." *Tennessee,* 626 F. Supp. at 1359.

The Supreme Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

Thus, we must look first to see if Congress' intent is clear. In general, the Court looks first to the language of the statute. If the meaning is clear, the Court must enforce the statute according to its terms. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110, *reh'g denied*, 461 U.S. 911 (1983); *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 417 (6th Cir. 1984).

However, as the District Court noted, the meaning of section 10161(h) is not clear, but rather is "susceptible to contradictory interpretations." *Tennessee*, 626 F. Supp. at 1357. Neither party's interpretation of "authorized" clearly effectuates congressional intent.[10] Therefore, we look to the legislative history and the overall structure of the Act.

The District Court correctly pointed out that the word "authorized" was used in six other instances in section 10161, and that in each case it referred to *congressional* authorization of an MRS facility. 626 F.Supp. at 1357. As the Supreme Court stated in *Sedima S.P.R.L. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275 (1985), "We should not lightly infer that Congress intended [a] term to have wholly different meanings in neighboring subsections." *Id.* at 3281 (footnote omitted). Nonetheless, the District Court found that the legislative history of the NWPA indicated that Congress intended that the provisions incorporated in section 10161(h) apply before congressional authorization of construction of an MRS facility, 626 F. Supp. at 1359.

---

[10] We note that a reading of the sections and subsections incorporated in section 10161(h) with the other provisions of section 10161(h) does not reveal Congress' intent. It is not possible, as section 10161(h) suggests, to simply insert "MRS" into every place where "repository" occurs in the listed provisions and get a logical result. For example, section 10135(b) provides that the designation of a site shall be effective 60 days after the President recommends the site under section 10134, unless the state submits a notice of disapproval in accordance with sections 10136 or 10138. Since section 10134 is not applicable to MRS facilities, the difficulties of adapting this section to the MRS proposal process are obvious. Neither party's interpretation of "authorized" will resolve this and other ambiguities in the Act.

The legislative history of the NWPA does not reveal the meaning that Congress intended to give "authorized." The District Court discusses the legislative history supporting the State's contention that Congress intended that the states have a significant role in the development of an MRS proposal in detail. *See id.* at 1357-59. Thus, we need not repeat tht discussion here, except to note that the legislative history does indeed provide some support for the State's contention that "authorized" means a facility being studied by the DOE for presentation to Congress.

However, we also note that the Act and its legislative history suggest that Congress had two conflicting goals: it wanted to provide the states with a meaningful role in the development of disposal facilities, but, as discussed in Part II *supra,* it also wanted to ensure the timely development of an MRS proposal. Adoption of the State's position would defeat the second goal, though it would further the first. The DOE's interpretation, on the other hand, would further the second goal, while impeding the first. In such an instance, we must adopt the DOE's position. As the Supreme Court noted in *Chevron, supra:*

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations
>
> > "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.
> >
> > "...If this choice represents a reasonable accomodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it

> unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

467 U.S. at 844-45 (citations and footnotes omitted) (ellipses in original). Moreover, the DOE's interpretation is a "contemporaneous construction" of the law by the agency " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Aluminum Co. of America v. Central Lincoln Peoples' Utility Distr.*, 467 U.S. 380, 390 (1984) (citation omitted). As such, it is entitled to deference.

The DOE's interpretation of "authorized" in section 10161(h) is a rational one. It does not totally deprive the State of its role in the MRS siting process, since the provisions set forth in section 10161(h) will apply when and if Congress approves the MRS proposal and authorizes construction of an MRS facility. Though the DOE's interpretation does give the State a more constricted role than the State would prefer, we cannot say that that role is clearly more limited than Congress had intended. Though there are arguments supporting the assertion that the states should have more input into the MRS siting process, we are mindful of the Supreme Court's statement in *Chevron, supra,* that: "When a challenge to any agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." 4167 U.S. at 866. Accordingly, we uphold the DOE's interpretation of "authorized" in section 10161(h) as meaning "authorized by Congress."[11]

IV.

Accordingly, we REVERSE the District Court holding that it had jurisdiction and further dismiss the petition for review of the Secretary's action.

---

[11] Because of our disposition of these issues, we need not reach the DOE's contention that a federal court may not constitutionally enjoin an agency from submitting information to Congress.

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

I concur in Judge Kennedy's analysis concerning jurisdiction; this court has original jurisdiction over actions concerning the issues here presented. *See General Elec. Uranium Management Corp. v. United States Dept. of Energy*, 764 F.2d 896, 904 (D.C. Cir. 1985). Her statement of the background of the cases is a correct recitation; therefore, I have no problem with parts I and II of the decision and join in this discussion and disposition.

The Act's consultation and cooperation requirements[1] present a confused and complicated set of problems. As pointed out in footnote 9 of Judge Kennedy's decision, Section 10137(c) of the NWPA requires the DOE to attempt to negotiate a *consultation* and *cooperation* agreement "[n]ot later than 60 days after (1) the approval of a site for site characterization for such a repository under section 10132(c)[2] ... or (2) the written request of the State...notified under section 10136(a)...." 42 U.S.C.A. § 10137(c). Here the DOE made no apparent attempt

---

[1] Section 10137(b) states:

> In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading [sic] any repository within such State, the Secretary shall *consult* and *cooperate* with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

42 U.S.C.A. § 10137(b) (emphasis added).

[2] Section 10132(c) provides for review of recommended candidate repository sites by the President. It does not refer to MRS facilities.

to negotiate a consultation and cooperation agreement on Tennessee sites before the Secretary recommended these sites for monitored retreivable storage (MRS) facilities.

The crux of the issue in the case is when the Secretary is to consult and cooperate with Tennessee officials after studying areas within Tennessee for determining the suitability of those areas as sites for an MRS facility. I agree with the district judge in this case that "inartful drafting of the NWPA makes a search for the answers" to the questions and issues involved "difficult." *State of Tennessee v. Herrington,* 626 F. Supp. 1345, 1356 (M.D. Tenn. 1986). I agree, furthermore, with Judge Wiseman that section 10161(h) "is susceptible to contradictory interpretations" and that it is "not unambiguous on its face." *Id.* at 1357. We must therefore consider the meaning of that section in relation to section 10137(b) and the other applicable parts of the NWPA.

The meaning of "authorized" in section 10161(h) is a very serious bone of contention. Does it mean that consultation and cooperation with the States is to take place *after* or *before* an MRS facility site has been selected and "authorized" by Congress? It is difficult to gainsay the district court's rationale:

> If the provisions of section [10161(h)] were to take effect only after Congressional authorization of an MRS facility, the state's rights to participate in consultation and cooperation procedures with the DOE, to receive formal notice that a site had been identified within its borders, and to disapprove a proposed site would be rendered meaningless.

626 F. Supp. at 1359.

The majority adopts the Agency interpretation of the several provisions in controversy as "rational" and therefore controlling in view of the Act's inherent ambiguity. I am disposed, however, to the view that this interpretation, which allows the state to be consulted only *after* Congress has authorized the site,

limits the state to such a restricted role that this interpretation is unreasonable and unacceptable in light of expressed legislative intent and other statutory language. Section 10137(b) is logically read as requiring the Secretary to consult and cooperate with Tennessee and its officials in the course of performing its full studies and appraisals and then considering candidates for MRS sites. This consultation and cooperation would take place before congressional authorization as the statutory scheme requires. The Act's legislative history seems to make this the clear intendment of the prescribed procedures in order to give the states a meaningful and timely role in the site selection process. *See* 626 F. Supp. at 1357-59 (discussing the Act's legislative history). This goal, I believe, takes precedence over the goal of "timely development of an MRS proposal" as described by Judge Kennedy.

I therefore respectfully dissent from Part III of the majority opinion.

WELLFORD, Circuit Judge, dissenting.

Because of the exceptional importance of the issues presented in this case, I respectfully dissent from the order denying a rehearing *en banc*. The decision in this case not only resolves a serious dispute for the State of Tennessee in its efforts to protect its environment and citizens, but will have important ramifications for the whole process of selecting nuclear waste disposal sites in the United States. It represents the first appellate consideration of a substantial portion of the Nuclear Waste Policy Act.

For the reasons stated in my dissent, I disagree with the majority's determination that the Department of Energy's "consultation and cooperation" with a state need not take place until after that state has been selected for a monitored retrievable storage (MRS) facility. I recognize, however, that this is a close question, and I believe the full court should consider this important issue.

APPENDIX B

State of Tennessee

v.

John Herrington, Secretary of the
United States Department of Energy.

Civ. A. No. 3-85-0959.

United States District Court,
M.D. Tennessee,
Nashville Division.

Nov. 26, 1985.

W.J. Michael Cody, Atty. Gen., John Knox Walkup, Chief Deputy Atty. Gen., Frank J. Scanlon, Deputy Atty. Gen., Nashville, Tenn., for plaintiff.

Joe E. Brown, U.S. Atty., James C. Thomason, Asst. U.S. Atty., Nashville, Tenn., Wells D. Burgess, Land and Natural Resources Div., U.S. Dept. of Justice, Washington, D.C., Gregory Fess, Dept. of Energy, Gen. Counsel, Washington, D.C., for defendant.

MEMORANDUM

WISEMAN, Chief Judge.

This is a case of first impression and involves an issue of pressing national importance—the safe storage of nuclear waste.[1] The case arises out of a dispute between the State of

---

[1] Although this Court recognizes that there are distinctions among the many forms of nuclear waste, the Court will use the phrase "nuclear waste" in this opinion to include the types of waste produced in civilian commercial activities covered by the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1982), including high-level radioactive waste, transuranic waste, low-level waste, and spent nuclear fuel.

Tennessee and the United States Department of Energy ("DOE") over whether the DOE followed proper statutory procedures in identifying sites in Tennessee as candidates for the temporary storage of nuclear waste in Monitored Retrievable Storage ("MRS") installations.

The State of Tennessee seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202; or, in the alternative, for a writ of mandamus under 28 U.S.C. § 1361 to compel the Secretary of Energy ("Secretary") to comply with certain provisions of the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. §§ 10101-10226 (1982). Recognizing the jurisdictional question raised by this action, the State has filed an identical complaint in the Court of Appeals for the Sixth Circuit, and asked the court of appeals to stay its proceedings until such time as this Court has decided the action.

The Secretary has moved to dismiss the complaint asserting lack of jurisdiction in this Court, insisting that the statutory scheme of the NWPA vests exclusive jurisdiction in the Court of Appeals to review actions of the Secretary in the administration of the NWPA.

The motion to dismiss is *denied.* For the reasons hereinafter set forth, this Court finds that it has jurisdiction of this case, and that the exclusive jurisdiction vested in the Courts of Appeals by section 119 of the NWPA[2] does not apply to Part C of Subchapter I of the NWPA, section 141.[3]

I. THE ACT

After years of unsuccessfully attempting to enact comprehensive legislation dealing with the urgent national problem of nuclear waste disposal, Congress passed the Nuclear Waste

---

[2] 42 U.S.C. § 10139 (1982).

[3] 42 U.S.C. § 10161 (1982).

Policy Act of 1982, Pub.L. No. 97-425, 96 Stat. 2202 (1983). The purpose of the NWPA is "to establish programs for the development of repositories for the safe permanent disposal of high level nuclear waste and spent fuel, and to provide for the safe stabilization and long-term protection of sites for the disposal of low level radioactive waste." H.R.Rep. No. 491(I), 97th Cong., 2d Sess. 26, *reprinted in* 1982 *U.S. Code Cong. & Ad.News* 3792. The federal waste management program articulated by the NWPA authorizes processes for both the permanent placement and the temporary storage of nuclear waste produced by civilian facilities.[4] The focus of this waste management program is on the development of permanent, deep repositories for nuclear waste.[5] The NWPA establishes a timetable for the Secretary to identify states containing "potentially acceptable sites" for a permanent repository and the mechanism for participation of states and Indian tribes in the sitting (sic) process.[6] Ultimately, the process results in the President's recommendation to Congress of one site for development of the first permanent repository.[7] The state or In-

---

[4] The NWPA authorizes the development of permanent repositories in sections 111-125, comprising Part A, "Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel," of Subchapter I. 42 U.S.C. §§ 10131-10145 (1982). In Part B of the statute, sections 131-137, 42 U.S.C. §§ 10151-10157, Congress authorizes the "Interim Storage Program," which is intended to provide federal storage capacity to utilities which cannot safely provide their own interim storage capacity for spent nuclear fuel at the site of each civilian nuclear power reactor, until the permanent repositories are constructed. 42 U.S.C. § 10151(b). Part C of the NWPA, section 141, which describes the process for siting Monitored Retrievable Storage facilities, is described in detail in the body of this opinion since it is the subject of this action. 42 U.S.C. § 10161 (1982).

[5] *See* 42 U.S.C. §§ 0131-10145 (1982).

[6] *See* 42 U.S.C. §§ 10131-10138 (1982).

[7] *See* 42 U.S.C. § 10134 (1982).

dian tribe affected may submit to Congress a notice of disapproval of the President's site recommendation,[8] and the site shall be disapproved unless Congress overrides the state veto by passing a resolution of repository sitting approval within 90 days.[9]

Congress also enacted Part C of Subchapter I of the NWPA, which deals with Monitored Retrievable Storage, as a "backup" to the repository program.[10] As its name implies, MRS basically requires the continuous monitoring of the waste stored in such a facility. Such waste may be retrieved at a later time, perhaps decades later, for placement in a permanent repository.[11] Congress has made it clear in the NWPA that MRS is not as desirable as the permanent repository system in furthering the national goal of the safe disposal of nuclear waste. Congress has authorized the Secretary to develop plans for MRS as the contingency plan for the long-term storage of nuclear waste in the event that Congress determines at a future date that such facilities are needed as part of the national nuclear waste management system. The legislative history to the NWPA makes it clear that MRS is not an alternative to the permanent repository system but is to be developed in conjunction with the repositories, if at all. H.R.Rep. No. 491(I), 97th

---

[8] 42 U.S.C. §§ 10136(b)(2), 10138(a) (1982).

[9] 42 U.S.C. § 10135(c) (1982). For a summary of this siting process, see *State of Texas v. U.S. Dept. of Energy*, 764 F.2d 278, 279-80 (5th Cir. 1985).

[10] 42 U.S.C. § 10161 (1982).

[11] For a study on MRS technology, see *The Monitored Retrievable Storage Concept, A Review of Its Status and Analysis of Its Impact on the Waste Management System*, U.S. Dept. of Energy, Dec. 1981, *cited in* H.R.Rep. No. 491(I), 97th Cong., 2d Sess. 41 n. 2, *reprinted in* 1982 *U.S.Code Cong. & Ad.News* 3792, 3807 n. 2.

Cong., 2d Sess. 44, *reprinted in* 1982 *U.S. Code Cong. & Ad.News* 3792, 3810. Section 141(h) of the NWPA[12] incorporates several of the sections and subsections of Part A of Subchapter I which deal with participation of states and Indian tribes in the selection of sites for permanent repositories. Therefore, states and Indian tribes have some of the same rights to participate in the selection of potential MRS sites and the same limited veto power as they have in the selection of sites for permanent repositories.

II. SUMMARY OF ARGUMENTS

The issue of whether original and exclusive jurisdiction is vested in the United States courts of appeals or the district courts to hear a challenge to the procedures followed by the Secretary in selecting potential sites in Tennessee for MRS installations involves a question of statutory construction. The State presents an uncomplicated, literal reading of the language of sections 119[13] and 141[14] in arguing that this Court has

---

[12] 42 U.S.C. § 10161(h) (1982).

[13] Section 119, 42 U.S.C. § 10139, is the only substantive statutory review provision in the NWPA. The part of section 119 which bears on the present action is subsection (a), which states:

> (1) Except for review in the Supreme Court of the United States, the United States Courts of Appeals shall have original and exclusive jurisdiction over any civil action—
> (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;
> (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;
> (C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;
> (D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this subtitle, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;
> (E) for review of any environmental assessment prepared under

jurisdiction over this case. The State argues that Congress incorporated certain provisions contained within Part A of Subchapter I, relating to state participation, into the MRS subtitle of Part C by specifically citing these provisions in section 141(h), and impliedly rejected the application of all other provisions of Part A to the MRS development process. The State also argues that the clear language of section 119(a), which vests jurisdiction in the court of appeals, demonstrates the clear Congressional intent that the section applies *only* to certain actions arising "under this part" (referring to Part A of Subchapter I)[15]

> section 10132(b)(1) or 10155(c)(2) of this title; or
> (F) for review of any research and development activity under subchapter II of this chapter.
> (2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

42 U.S.C. § 10139(a) (1982). The only other provision in the NWPA mentioning statutory review, section 221, which is contained within Subchapter II, merely refers back to section 119(a)(1) by stating "[j]udicial review of research and development activities under this subchapter shall be in accordance with the provisions of section [119] of this title." 42 U.S.C. § 10201 (1982).

[14] Section 141, which is contained within Part C of Subchapter I, pertains to Monitored Retrievable Storage. The part of this section which is at issue in this case is subsection (h), which states:

> Any facility authorized pursuant to this section shall be subject to the provisions of section 10135[115], 10136(a)[116(a)], 10136(b) [116(b)], 10136(d)[116(d)], 10137[117], and 10138[118] of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135[115] through 10138[118] of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

42 U.S.C. § 141(h) (1982).

[15] *See supra* note 13.

and to actions arising under provisions outside of Part A of Subchapter I which are specifically enumerated in section 119(a)(1)(D)-(F). The State does not challenge the jurisdiction granted the courts of appeals over actions arising under these sections; however, the state relies on what it believes is the clear language of section 119(a), which does not refer to Part C of Subchapter I, concerning Monitored Retrievable Storage, in vesting original and exclusive jurisdiction in the courts of appeals, to exclude actions arising under Part C from the jurisdictional provision.

The Secretary presents a more convoluted analysis of the Act's construction. The Secretary states that the State of Tennessee's complaint alleges that he failed to comply with the provisions providing for state participation in the MRS siting process. The Secretary argues that the State thereby states a cause of action pursuant to section 119(a)(1)(B) which vests jurisdiction over actions alleging the failure of the Secretary to take any action required "under this part" in the courts of appeals.[16] Arguing that the phrase "under this part" should not be read literally, the Secretary claims that since the procedures for state participation which are incorporated in section 141(h), relating to MRS, are located in Part A of Subsection I, therefore, the judicial review section of Part A, section 119, must also apply to actions involving section 141(h). The Secretary also argues that the fact that there is no judicial review provision in Part C of Subchapter I, while there is in Part A, militates in favor of finding exclusive jurisdiction vested in the courts of appeal. Finally, the Secretary argues that the most important reason for finding that Congress vested jurisdiction in the courts of appeals is the public policy behind avoiding lengthy litigation and duplicative review over a national program of urgent concern.

---

[16] 42 U.S.C. § 10139(a)(1)(B) (1982).

III. ANALYSIS

The Court finds the Secretary's position without merit. The Judicial Code of 1911, ch. 2, § 24, 36 Stat. 1087, 1091-94 (1911) (current version of 28 U.S.C. §§ 1331-1361), removed all original and exclusive jurisdiction from what are known today as the United States circuit courts of appeals. Although Congress since that time has restored original jurisdiction to the courts of appeals over certain types of cases,[17] the statutes which have done so have been express in their grant of jurisdiction and have been construed strictly. Section 119 of the NWPA expressly vests jurisdiction in the courts of appeals over the actions specifically enumerated in subsection *a*, thus expressly repealing the Judicial Code of 1911; however, actions arising under the MRS provision, section 141, are not mentioned as being within that section's scope. Therefore, for jurisdiction over actions arising under section 141 to be vested in the courts of appeals pursuant to section 119, an implied repeal of the Judicial Code of 1911 is required. It is a universally recognized principle that repeals of statutes by implication are not favored. *See, e.g., United States v. Will,* 449 U.S. 200, 221-22, 101 S.Ct. 471, 484, 66 L.Ed.2d 392, 410 (1980); *Allen v. McCurry,* 449 U.S. 90, 99, 101 S.Ct. 411, 417, 66 L.Ed.2d 308, 316 (1980); *Executive Limosine Service, Inc. v. Goldschmidt,* 628 F.2d 115, 120 (D.C.Cir. 1980). The intention of the legislature to repeal a statute must be "clear and manifest," *see, e.g., Watt v. Alaska,* 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed. 80, 88 (1981) (quoting *United States v. Borden Co.,* 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181, 191 (1939), and absent some affirmative showing of a Congressional intention to repeal, the only permissible justification for finding repeal by implication is when earlier and later statutes cannot be reconciled. *See, e.g., Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189-90, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117, 143 (1978); *Izaak Walton*

---

[17] *See infra* note 26 and accompanying text.

League of America v. Marsh, 655 F.2d 346, 366 (D.C.Cir.), *cert. denied,* 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); *Equitable Life Assurance Society of the United States v. Grosvenor,* 426 F.Supp. 67, 71 (W.D.Tenn. 1976), *aff'd,* 582 F.2d 1279 (6th Cir.1978) (unpublished), *cert. denied,* 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979). Congress has not expressed a clear intention in any of the legislative materials[18] to vest original jurisdiction over actions arising under the MRS provision, section 141, in the courts of appeals, so as to impliedly repeal the Judiciary Act of 1911. Accordingly, jurisdiction over this action is vested in this Court.

Other well-established principles of statutory construction also mandate the conclusion that jurisdiction over this action is vested in this Court. The primary function of the courts in construing legislation is to effectuate the intent of the legislature. *Philbrook v. Glodgett,* 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525, 533 (1975). Legislative intent may be ascertained from the clear language of the statute itself or from legislative materials which clearly reveal this intent, *In re Arnett,* 731 F.2d 358, 361 (6th Cir.1984). Courts should look first to the language of a statute, however, to determine its legislative purpose. *See, e.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931, 936 (1979); *Securities & Exchange Commission v. Ambassador Church Finance/Development Group, Inc.,* 679 F.2d 608, 611 (6th Cir., 1982). The Sixth Circuit Court of Appeals has stated that "[w]here a statute is unambiguous, it should be given effect ac-

---

[18] After having conducted an exhaustive search of the legislative materials of the NWPA, the Court has found no Congressional intent to vest exclusive jurisdiction in the courts of appeals over any actions arising under the NWPA other than those specifically enumerated in section 119(a) of the Act, 42 U.S.C. § 10139(a). In particular, neither the legislative history to section 119(a), nor section 141(h), demonstrates any legislative intent to vest exclusive jurisdiction in the courts of appeals over actions which challenge the procedures used by the Secretary of Energy in selecting potential sites for MRS installations. *See* H.R.Rep. No. 491(I), 97th Cong., 2d Sess. 56 *reprinted in* 1982 *U.S.Code Cong. & Ad.News* 3792, 3822-23.

cording to its literal language." *Hilliard v. United States,* 310 F.2d 631, 632 (6th Cir.1962). Accordingly, courts may not discover a congressional intent, under the guise of statutory construction, which is contrary to the clear language of the statute itself. *Hall v. Secretary, Health, Education & Welfare,* 600 F.2d 556, 561 (6th Cir.1979).[19]

The Court finds that section 119(a) of the NWPA clearly limits the original and exclusive jurisdiction of the courts of appeals to those actions specifically enumerated in subsections (1)(A)-(F).[20] The Secretary asks this Court to ignore the clear language of subsections (1)(B) and (1)(C) which vests jurisdiction in the courts of appeals over actions challenging certain decisions made, or actions taken, "under this part." The phrase "this part" refers to Part A of Subchapter I of the NWPA, and this part only. The internal consistency of the statute in at least two instances supports the Court's conclusion that jurisdiction over this action is vested in the district courts. First, the terms "part," "subtitle,"[21] "title," and "subchapter" were used intentionally and with deliberate, discrete meaning by Congress because those terms define the structure of the NWPA. Second, in section 141(h),[22] Congress

---

[19] *See supra* note 18 and accompanying text.

[20] 42 U.S.C. § 10139(a)(1)(A)-(F) (1982).

[21] Although the statute itself does not clearly define the term "subtitle," the legislative history to the Act makes clear that the term, as used in section 119(a)(1)(D), is interchangeable with the term "part." For an example of this fact, see H.R.Rep. No. 491(I), 97th Cong., 2d Sess. 50 & 56, *reprinted in* 1982 *U.S.Code Cong. & Ad.News* 3792, 3816 & 3822 (Part A of Subchapter I is referred to as Subtitle A, and the legislative history to section 119(a)(1) also refers to Part A in this manner.)

[22] 42 U.S.C. § 10161(h) (1982).

enumerated the provisions of Part A of Subchapter I which were incorporated in Part C. Section 119 was *not* one of the sections which was incorporated to apply to Monitored Retrievable Storage.[23] Both of these internal consistencies indicate that Congress intended to vest jurisdiction over MRS actions in the district courts.

In reaching this decision the Court is in disagreement with two courts of the District of Columbia Circuit which have faced an analogous question. *See General Electric Uranium Management Corp. ("GEUMCO") v. United States Department of Energy,* 764 F.2d 896 (D.C.Cir. 1985); *Wisconsin Electric Power Co. v. Hodel,* 626 F.Supp. 424 (D.D.C.1984) *aff'd.,* 778 F.2d 1 (D.C.Cir.1985). Both cases involved challenges to fees which utility companies using or planning to use nuclear reactors to generate electric power are required to pay into the Nuclear Waste Fund pursuant to section 302 of the NWPA.[24] Section 302 is contained within Subchapter III of the NWPA. The *Wisconsin Electric* court held that literal reliance on the term "part" is misplaced because section 302(a)(1),[25] authorizes

---

[23] The Secretary's argument that the courts of appeals have exclusive jurisdiction over actions arising under section 141(h) because that provision incorporates several provisions of Part A of Subchapter I leads to the incongruous result that jurisdiction over actions arising under that section would be vested in the courts of appeals, while jurisdiction over actions arising under other MRS provisions, section 141(a)-(f), would be vested in the district courts. The Secretary certainly does not intend for this result to occur.

[24] 42 U.S.C. § 10222 (1982). *GEUMCO* involved a challenge to the one-time fee charged utilities for spent nuclear fuel used to generate electricity before April 7, 1983, pursuant to section 302(a)(3) of the NWPA, 42 U.S.C. § 10222(a)(3). *Wisconsin Electric* involved a challenge to the ongoing fee for spent nuclear fuel used to generate electricity on and after April 7, 1983, pursuant to section 302(a)(2) of the NWPA, 42 U.S.C. § 10222(a)(2). Congress established the ongoing fee, and ordered the Secretary of Energy to promulgate the one-time fee, which he established by rulemaking proceedings. Art. VIII, A.2, 10 C.F.R. § 961.11 (1985).

[25] 42 U.S.C. § 10222(a)(1) (1982).

the Secretary of Energy "[i]n the performance of his functions *under this chapter*" to enter into contracts with those who generate or hold title to nuclear waste to provide the funds for nuclear waste disposal. (Emphasis added). The court felt that the reference to "chapter" in section 302(a)(1) somehow was enough to "meld" that section with section 119(a)(1)(A), which is contained within Part A of Subchapter I. That finding, together with the practical reason stated by the court that the court of appeals would have a "rulemaking record" upon which to base its findings, led the district court to conclude that original jurisdiction is vested in the courts of appeals over any action arising under section 302, 42 U.S.C. § 10222.

The Court of Appeals for the District of Columbia in *GEUMCO* carefully traced through the provisions and the structure of the Act, and took a very broad view of the original and exclusive jurisdiction of the courts of appeals under the NWPA. Noting that Congress expressed its goal to establish a Nuclear Waste Fund in section 111(b)(4), which is contained within Part A of Subchapter I of the NWPA,[26] the *GEUMCO* court found that section 302,[27] which is contained within Subchapter III, incorporates by reference the "functional responsibilities" of the Secretary of Energy under Part A of Subchapter I, including the establishment and administration of the Nuclear Waste Fund.[28] *GEUMCO,* 764 F.2d at 902. The court found that the structure of the Act supports the view that it would be "singularly incongruous" for fee questions to be subject to review in both the district courts and courts of appeals. *Id.* The court concluded

---

[26] 42 U.S.C. § 10131(b)(4) (1982).

[27] 42 U.S.C. § 10222 (982).

[28] The *Geumco* court cited the *Wisconsin Electric* opinion with approval on this point. 764 F.2d at 902 n. 32.

that from whatever vantage point it approached the statutory construction problem presented by section 302, it invariably concluded that Congress intended to vest original and exclusive jurisdiction over actions raising this issue in the courts of appeals.

These two opinions do not shake this Court's belief that Congress intended to vest original and exclusive jurisdiction over MRS actions in the district courts. Opinions of courts of sister circuits are persuasive, but not binding on this Court. These two courts overlook the fact that Congress has not repealed the provisions of the Judicial Code of 1911, ch. 2, § 24, 36 Stat. 1087, 1091-94 (1911) (current version at 28 U.S.C. §§ 1331-1361), so as to vest jurisdiction in the courts of appeals over actions not specifically enumerated in section 119(a)(1).[29] Absent a clear and specific Congressional directive to relinquish jurisdiction, this is the trial level court under our judicial scheme. Rewriting a statute is not the province of the judiciary. For this Court to read the term "part" out of the statute is both presumptuous and violative of the rules of statutory construction above. This Court finds the statutory language clear, and not subject to judicial revision.[30]

The thorough analysis of the NWPA articulated by the District of Columbia Court of Appeals in *GEUMCO* court merits further discussion. The *GEUMCO* opinion is distinguishable from the case at hand, and, to the extent that *GEUMCO* is not distinguishable, this Court disagrees with its holding. The *GEUMCO* court cited three reasons for holding that original and exclusive jurisdiction over nuclear waste fee questions was vested in the courts of appeals:

---

[29] *see supra* note 13.

[30] In reaching this conclusion, this Court agrees with the opinion of the lower court in *GEUMCO*. *See General Electric Uranium Management Corp. v. U.S. Dept. of Energy*, 584 F.Supp. 234, 236-37 (D.D.C.1984) (Richey, J.), *rev'd*, 764 F.2d 896 (D.C.Cir.1985).

> First, despite the statute's lack of clarity, we find every indication from those sections of the statutes relied on by DOE, as well as from related sections, and from the structure of the statute as a whole, that Congress intended that the court of appeals would have original and exclusive jurisdiction in cases of this sort. Second, the legislative history, although not illuminating on this question, certainly does not compel a result contrary to the one we reach here. Third, the policy considerations underlying this case, and articulated in other judicial decisions covering analogous statutes, overwhelming support our conclusions.

GEUMCO, 764 F.2d at 901. As previously stated, this Court believes that rules of statutory construction compel a contrary conclusion as to the first justification. This case, however, is distinguishable from *GEUMCO* because, unlike the Nuclear Waste Fund, MRS is not mentioned in Part A of Subchapter I of the NWPA. The process undertaken by the *GEUMCO* and *Wisconsin Electric* courts to "meld" section 119 with section 302 cannot rationally be achieved between section 119 and section 141, the MRS provision.

The second justification stated by the *GEUMCO* court was that there is no explanation in the legislative history for the physical separation of the fee provisions of section 302 from the judicial review provisions in section 119. Neither is there an explanation in the legislative history for the separation, although somewhat less physically removed from one another, of the MRS provision of section 141 from the judicial review provisions of section 119. As previously stated,[31] however, this Court is very hesitant to divine a Congressional intent to vest jurisdiction over MRS actions exclusively in the courts of appeals on the ground that the legislative history is silent.

---

[31] *See supra* note 18 and accompanying text.

The *GEUMCO* court stated three policy considerations weighing in favor of the court's conclusion on jurisdiction. Citing the public policy of avoiding duplicative judicial review and the attendant delay and expense involved, the court stated that "in administrative appeals, "where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter." " 764 F.2d at 903 (quoting *Denberg v. United States Railroad Retirement Board,* 696 F.2d 1193, 1197 (7th Cir. 1983), *cert. denied,* 466 U.S. 926, 104 S.Ct. 1706, 80 L.Ed.2d 180 (1984)). The *GEUMCO* court next stated that, because there were no factual findings to be made due to the extensive rulemaking record in the case, the court of appeals would review exactly the same record as would be reviewed by a district court.[32] Third, the court stated that vesting original jurisdiction in the courts of appeals promotes the Congressional goals of predictability and efficiency in dealing with the pressing national concern of the safe disposal of nuclear waste. *Id.* at 904.

This Court concedes the importance of the public policy considerations articulated by the *GEUMCO* court. The goals of judicial efficiency and predictability and the avoidance of duplicative review are laudable ones. The Nuclear Waste Policy Act, however, establishes a unique method of review in section 119. As earlier stated, Congress has restored original jurisdiction to the courts of appeals in piecemeal fashion since the Judiciary Act of 1911 abolished such jurisdiction. Today, numerous statutes vest original and exclusive jurisdiction in the

---

[32] The *GEUMCO* court stated that "even without an extensive record or hearing before the agency, it is rare that the factfinding capacity of the district court is required in judicial review of administrative agency actions." 764 F.2d at 903 & n. 38 (citing *Florida Power & Light Co. v. Lorion,* ____ U.S. ____, ____, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643, 656 (1985)). This simple declaration presumes, of course, that an agency record in fact exists.

courts of appeals to review administrative action.[33] Such statutes, however, anticipate that the applicable federal agency or commission will develop an administrative record which the courts of appeals may review. In this case, an administrative record does not exist. If original jurisdiction over MRS actions was vested in the courts of appeals, the Court of Appeals for the Sixth Circuit would be compelled to hear proof in this case on the issue of whether or not the Secretary of Energy followed the proper statutory procedures in identifying sites in Tennessee as candidates for MRS installations. Since district courts are well-equipped to develop a record for review, the Court feels this point is further evidence that Congress intended that jurisdiction over MRS actions lie in the district courts.

IV. CONCLUSION

For the foregoing reasons, the Court holds that subject matter jurisdiction over the State of Tennessee's claim lies exclusively in the district courts. Whether this result comports with the national policy of the speedy resolution of actions challenging the nuclear waste management plan is a matter for Congress to decide, not the courts.

---

[33] Some of the more widely used provisions vesting exclusive jurisdiction in the courts of appeals over certain governmental orders are as follows: the Hobbs Act, 28 U.S.C. §§ 2342-2350, concerning the Federal Communications Commission, the Federal Maritime Commission, the Nuclear Regulatory Commission, and the Interstate Commerce Commission; the Securities Act, 15 U.S.C. § 77i; and the Securities Exchange Act, 15 U.S.C. § 78j; concerning the Securities and Exchange Commission; the Federal Aviation Act, 49 U.S.C. § 1486, concerning the Federal Aviation Administration; and the Immigration and Nationality Act, 8 U.S.C. § 1105a, concerning the Immigration and Naturalization Service. *See generally* G. Edles & J. Nelson, *Federal Regulatory Process: Agency Practices & Procedures* § 8.4, at 180 (1981 & Supp.1984). Despite the fact that Congress very easily could resolve the prickly question of whether a court of appeals or a district court has jurisdiction by a statutory amendment, it has not done so. *See* K. Davis, *Administrative Law Treatise* 134 (2nd ed. 1983). Courts must continue to consider this question. For a short listing of recent cases, see *GEUMCO,* 764 F.2d at 903 nn. 35-38.

ORDER

For the reasons set forth in the memorandum opinion filed contemporaneously herewith, the motion to dismiss for lack of jurisdiction of the subject matter is DENIED. Because this Court is of the opinion that this order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, an immediate appeal is authorized pursuant to the provisions of 28 U.S.C. § 1292(b).

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 3-85-0959

State of Tennessee,

vs.

John Herrington, Secretary of the United States Department of Energy.

February 5, 1986.

W. J. Michael Cody, Atty. Gen., John Knox Walkup, Chief Deputy Atty. Gen., Frank J. Scanlon, Deputy Atty. Gen., Nashville, Tenn., for plaintiff.

Joe E. Brown, U.S. Atty., James C. Thomason, Asst. U.S. Atty., Nashville, Tenn., Wells D. Burgess, Land and Natural Resources Div., U.S. Dept. of Justice, Gregory Fess, Dept. of Energy, Gen. Counsel, Washington, D.C., for defendant.

MEMORANDUM

WISEMAN, Chief Judge.

Before the Court, on the State of Tennessee's first cause of action, are cross-motions for summary judgment which require interpretation of certain provisions of the Nuclear Waste Policy Act of 1982 ("NWPA").[1] In 1982, Congress enacted the NWPA, an ambitious statute whose intent was to grapple with the multitude of problems associated with the generation of nuclear waste by commercial power facilities. The federal waste management program articulated by the NWPA focuses on the

---

[1] 42 U.S.C. § 10101-10226 (1982).

development of permanent, geologic repositories, and also addresses the temporary disposal and storage of nuclear waste. One such scheme approved for further study is Monitored Retreivable Storage ("MRS"), two characteristics of which are that it would require the repackaging and continuous monitoring of the waste stored in such a facility until it is retrieved, perhaps decades later, for transfer to a permanent repository.[2] If determined to be a necessary part in the national waste management system, MRS would serve as a "back-up" to the permanent repositories.[3]

To aid in its determination of the need for MRS, Congress ordered the Secretary of the United States Department of Energy to submit a proposal for the construction of one or more MRS facilities.[4] This proposal was to include a detailed study of the need for and feasibility of MRS and site-specific designs.[5] In late December, 1985, the Secretary completed his final draft MRS proposal.[6] He concluded that a single, integral MRS facility is a necessary component of the waste management system, and decided that this facility should be sited in the State of Tennessee. The Secretary plans to submit this proposal to Congress on or after February 6, 1986.

The specific question before the Court is whether the State of Tennessee is entitled to a declaratory judgment that the Secretary violated the provisions of section 141(h) of the Act, 42 U.S.C. § 1061(h), in making his determination as to the preferred site of the MRS facility, and whether the Secretary should

---

[2] *See generally The Need For and Feasibility of Monitored Retrievable Storage — A Preliminary Analysis,* DOE/RW 0022 (Apr. 1985) (Plaintiff's Exhibit C).

[3] *See generally id.*

[4] *See* 42 U.S.C. § 10161(b) (1982).

[5] *See id.*

[6] *See Monitored Retrievable Storage Submission to Congress,* DOE/RW (review copy) (Dec. 1985) (Plaintiff's Exhibit J).

be enjoined from submitting the allegedly flawed portion of the MRS siting study to Congress when the Secretary presents his recommendation.[7] Based upon the Court's analysis of the NWPA and its legislative history, the Court declares that the provisions incorporated in section 141(h) take effect prior to Congressional authorization of an MRS facility. Upon reviewing the voluminous record in this action, the Court also renders a declaratory judgment that the Secretary has violated section 117(b) of the Act, 42 U.S.C. § 10137(b), by failing to consult and cooperate with the State of Tennessee in conducting extensive siting studies. Thus, the siting portion of the Secretary's final proposal is fatally flawed. Partial summary judgment is granted to the State of Tennessee upon its first cause of action. Accordingly, the Secretary may submit no portion of the proposal to Congress which relates in any way to the siting and identification study which failed to comply with the consultation and cooperation requirements of the NWPA.

All parties concerned will benefit by a short statement of what this ruling is, and is not, about. The Court cannot express its personal views on nuclear energy in general or on the proper role of Monitored Retrievable Storage in achieving society's goal of permanent and safe resolution of the dangers of rapidly accumulating nuclear waste. This Court can determine, however, whether the law has been violated by the Secretary of Energy. This Court declares, without hesitation, that the Secretary has failed to carry out the statutory duties assigned to him. The Secretary has taken very few steps to achieve the clear purposes of the statute, which envisions that the states be granted the broadest possible rights in participating in the development of MRS facilities and in gaining the public's trust in the federal waste managment program.

---

[7] In the alternative, the State of Tennessee seeks a writ of mandamus under 28 U.S.C. § 1361 to compel the Secretary to comply with certain provisions of the NWPA.

I.

Jurisdiction

At the outset, the Court must address the threshold issue of jurisdiction. Recently the Court considered the defendant's motion to dismiss this action based upon the argument that the NWPA vested original jurisdiction over cases arising under the Act in the circuit courts of appeals. *See Tennessee v. Herrington,* 622 F.Supp. 923 (M.D. Tenn. 1985) ("*Tennessee I*"). This Court examined the plain language of the NWPA and concluded that exclusive jurisdiction over this action was vested in the district court.[1] The Court certified its order for interlocutory review pursuant to 28 U.S.C. § 1292(b). No action has yet been taken on this expedited appeal. In the absence of any Sixth Circuit action on the jurisdiction issue, and in view of the fact that the Secretary intends to make his MRS recommendation to Congress on or soon after February 6, 1986, this Court must act expeditiously on the merits of the case.

II.

MRS Background

At the heart of this litigation lies the following statutory provision: "Any facility authorized pursuant to this section shall

---

[1] In its earlier opinion, the Court carefully distinguished two opinions from the District of Columbia Circuit, which held that original jurisdiction over actions challenging the fee provisions of the NWPA was vested exclusively in the circuit courts of appeals. *See General Electric Uranium Management Corp., ("GEUMCO") v. DOE,* 764 F.2d 896 (D.C.Dir., 1985); *Wisconsin Electric Power Co. v. Hodel,* 626 F.Supp. 424, (D.D.C. 1984). Since this Court's opinion was issued, the D.C. Circuit, expressly following *GEUMCO,* affirmed the lower court's jurisdictional conclusion in *Wisconsin Electric. See Wisconsin Electric Power Co. v. DOE,* 778 F.2d 1 (D.C.Cir., 1985). This recent decision is inconsistent in some respects, in that it follows *GEUMCO's* overly broad interpretation of the NWPA on the jurisdiction question, but upon reaching the action's merits, interprets the language of certain provisions of the Act strictly.

be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title."[9] This subsection, which applies to any MRS facility, incorporates nearly all of the state participation requirements applying to permanent repositories.[10] Its interpretation is determinative of this action.

The dispute in this case turns on the time at which the state consultation and cooperation requirements of section 117 of the Act, 42 U.S.C. § 10137, are triggered. The State of Tennessee maintains that these requirements necessarily apply to all of the DOE's activities subsequent to the initial steps taken in the MRS siting process. Thus, the DOE would be required to seek the state's participation in the siting process and give substantive weight to the state's comments in its decision. The Secretary argues, in contrast, that the DOE has no duty to consult and cooperate with the State prior to Congressional authorization of an MRS facility, and that the DOE discharges its responsibilities by submitting the State's comments to Congress. In determin-

---

[9] 42 U.S.C. § 10161(h) (1982). "Title" refers to Subchapter 1 of the NWPA. *See* H.R.Rep. No. 491(I), 97th Cong., 2d Sess. 49, *reprinted in* 1982 *U.S. Code Cong. & Ad. News,* 3792, 3815. Furthermore, any reference in the incorporated provisions to a repository shall be considered to be a reference to an MRS facility.

[10] The lone exception is section 116(c) of the Act, 42 U.S.C. § 10136(c), which requires that financial assistance be granted to states for the purpose of their participating in all activities required by sections 116 and 117 of the Act, 42 U.S.C. §§ 10136-37. The MRS section contains its own financial assistance provision, which requires the Secretary to make annual "impact aid payments" to local governments in order to mitigate the economic and social impacts resulting from the construction and operation of an MRS facility. *See* 42 U.S.C. § 10161(f) (1982). The NWPA itself does not require the Secretary to compensate the states for their efforts in the MRS consultation and cooperation process in connection with the MRS siting. The Secretary volunteered to provide the states with funds and technical assistance to help them "gain an understanding of the impacts of siting an MRS within its jurisdiction and, subsequently, to form independent opinions regarding MRS acceptability." Plaintiff's Exhibit A; Defendant's Exhibit B.

ing the outcome of this action, the Court must consider the facts of the case and examine the general statutory structure of MRS.

A. *Facts*

On April 25, 1985, the director of the Office of the Civilian Radioactive Waste Management of DOE formally notified Tennessee Governor Lamar Alexander of the DOE's intent to ask Congress in January, 1986, to authorize construction of an MRS facility in Tennessee.[11] In addition to the notice to Governor Alexander, the DOE announced its MRS proposal in the Federal Register the following day, identifying Tennessee as the preferred location for such a facility.[12] The "Screening and

---

[11] Plaintiff's Exhibit A; Defendant's Exhibit B.

[12] *See* 50 Fed.Reg. 16,536 (Apr. 26, 1985). This announcement revealed that several MRS studies relating to the State of Tennessee had been completed or were in the process of being prepared. One was the preliminary needs and feasibility study, *The Need For & Feasibility of Monitored Retrievable Storage — A Preliminary Analysis*. DOE/RW 0022 (Apr. 1985) (Plaintiff's Exhibit C), which justified the "concept" of an "integral" MRS facility developed in conjunction with the permanent repository system. *See* 50 Fed.Reg. 16, 536 (Apr. 26, 1985). The DOE also announced the release of an extensive site screening study, *Screening & Identification of Sites For a Proposed Monitored Retrievable Storage Facility*, DOE/RW 0023 (Apr. 1985) (Plaintiff's Exhibit D; Defendant's Exhibit C) ("Screening and Identification Study"), identifying three sites in Tennessee as "candidate MRS sites" which include a preferred site and two alternate sites. The DOE stated that the Tennessee sites were preferrable to the eight sites in other southeastern states which were judged by the DOE to be "potentially acceptable" in an initial screening. *Id.* at 42. *See Monitored Retrievable Storage Facility Site Screening & Evaluation Report*, DOE/NBB-0071 (May 1985) (3 volumes) (Defendant's Exhibit C). In its announcement, the DOE also stated its intention to prepare environmental assessments of the potential sites in Tennessee as required by section 141(c) of the NWPA, 42 U.S.C. § 10161(c), *see* Fed.Reg. 16,536 (Apr. 26, 1985), and to provide funds and technical assistance to Tennessee to help the state understand the potential impacts of MRS. *Id.* at 16,535.

The Secretary's obviously extensive and time-consuming identification and screening process consisted of four steps. First, the Secretary

Identification Study" released by the DOE, which identified potential MRS sites,[13] revealed that an extensive siting process already had been completed. The DOE also expressed its intent to work closely with the states and public "to prepare the best supporting documentation possible" for the Secretary's proposal to Congress, to allow all affected parties to express their views during development of the proposal, and to provide complete information to the states and public "which will allow their informed participation in the Congressional decision-making process."[14]

---

identified eleven potentially acceptable sites by applying a short list of screening factors. *See Screening & Identification Study* at 9, 22-26. This first step involved identifying potential sites (1) in a preferred southeast region, (2) which were either owned by DOE or docketed with the NRC, and (3) which had 1,100 available acres. *Id.* at 4-8. In the second step of the analysis, "the eleven sites were thoroughly analyzed by a task force of specialists in eight areas important to evaluating site suitability." *Id.* at 9. These eight factors were as follows:

> (1) ease of regulatory compliance; (2) existing environmental setting; (3) geotechnical site characteristics; (4) socioeconomic setting and changes which might be induced by MRS development; (5) institutional and administrative structure of the state; (6) local transportation characteristics; (7) access to physical infrastructure (e.g., utilities); (8) capital cost of construction.

Id. Using these criteria, the Secretary concluded that an MRS facility could be constructed at any one of the eleven sites. *Id.* at 33. Ranking of these sites was left to the subjective evaluation of DOE officials in the third and fourth states of the Secretary's siting process. In the third state, the DOE attempted to anticipate various problems which might be encountered in developing an MRS at each of the eleven potential sites, including the potential for delay. *Id.* at 10. DOE officials in the fourth stage of the siting process attempted to determine the sites at which they believed an MRS facility "could most successfully be deployed." *Id.* The Secretary thereafter eliminated two sites from consideration, identified the three Tennessee sites as being preferable and therefore "candidate sites," and identified the Clinch River Breeder Reactor site near Oak Ridge, Tennessee, as most preferable. *Id.* at 41-45.

[13] *See id.*

[14] 50 Fed.Reg. 16,537 (Apr. 26, 1985).

Since the "Screening and Identification Study" was announced to the public on April 26, 1985, Tennessee officials have scrambled to "catch up" with the DOE and study the potential impacts of MRS on the state. The state executive body which was delegated responsibility for determining the impact of MRS has, among other actions, conducted studies, requested information from the DOE on MRS technology and the three "preferred" sites in the state, organized public hearings, sponsored a toll-free telephone line for public polling purposes, and accepted petitions from the state's citizens regarding the siting of an MRS facility in Tennessee.

During the period from April, 1985, until December, 1985, the DOE's efforts to comply with the State's requests for information were hindered because several studies were as yet being prepared. In fact, the final draft of several documents was not completed until late December, 1985. In August, 1985, expressing concern that it had not received several key elements of the MRS proposal, such as a waste transportation study, and cost and benefit and risk assessment comparisons among system alternatives, the State requested that it be given ninety days to study the final proposal before it was submitted to Congress, in order for the State to prepare a "studied opinion" for submission to Congress.[15] Increasingly frustrated by the Secretary's failure to provide essential MRS studies for state review, the State of Tennessee filed this action on August 20, 1985.

The Secretary has denied the State's request for a grace period by his actions. Subsequent to the filing of this suit, the Secretary has continued to supply the State with information as he felt it became available and also has provided preliminary drafts of studies as they were completed. On December 24, 1985, the State of Tennessee received the final MRS proposal

---

[15] *See* Plaintiff's Exhibit F; Defendant's Exhibit O (letter from James Word to Ben Rusche (Aug. 9, 1985)).

and was advised that the proposal would be presented to Congress shortly after February 6, 1985. The DOE also informed the State that any comments received from the State by that time would be forwarded directly to Congress, and that the State could provide additional comments to the members of Congress during their deliberations on the MRS proposal.

B. *Section 141*

In 1982, the NWPA charged the DOE with the long-term responsibility of drafting a detailed study of the need for and feasibility of the construction of one or more MRS facilities.[16] The DOE has been actively engaged in this process for the past three years, and has completed a final draft MRS proposal to Congress.[17] The NWPA also required the DOE to comply with the provisions incorporated in section 141(h), 42 U.S.C. § 10161(h), which also apply to the repository siting process. Generally, these provisions call for the participation of affected states in the siting of MRS facilities, and require consultation and cooperation between the Secretary of Energy and these states.

The NWPA requires the Secretary, within ninety days of the effective date of the Act (January 7, 1983), to identify states with one or more potentially acceptable sites for an MRS facili-

---

[16] The NWPA required that this study include a site-specific facility design, a program plan covering funding and integration of the MRS facility with other storage and disposal facilities authorized by the Act, and an environmental assessment for each of three alternative sites. *See* 42 U.S.C. § 10161(b) (1982). The Secretary must prepare the environmental assessments in compliance with the regulations promulgated pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1982).

[17] *See Monitored Retreivable Storage Submission to Congress,* DOE/RW (review copy) (Dec. 1985) (Plaintiff's Exhibit J).

ty.[18] Within ninety days of this identification, the Secretary must notify the Governor and legislature of any potentially acceptable sites within the state.[19] The NWPA places on the Secretary an ongoing duty to keep the state informed as to the progress of the plans being made for the MRS facility.[20] The Act also requires that the Secretary engage in a process of "consultation and cooperation" with the state in a effort to resolve the concerns of the state regarding MRS.[21] Furthermore, the Secretary is required to attempt to negotiate a binding written agreement with the state to determine how the consultation, cooperation, and exchange of information under section 117(a) and (b), 42 U.S.C. § 10137(a)-(b), will be conducted.

After the Secretary submits his MRS proposal to Congress, the NWPA grants the right to *disapprove* the Secretary's proposed MRS site within a specified time period to three state entities: (1) the Governor of the State; (2) the state legislature; or (3) some other entity or person so designated by state law in lieu of the Governor or legislature.[22] In the event a state issues a notice of disapproval, Congress may override the state veto within ninety days by resolution of both the Senate and House of Representatives.[23] If the site selected by the Secretary is not challenged by the affected state or if it survives the disapproval process, the MRS proposal itself must be approved by Congressional enactment.[24]

---

[18] *See* 42 U.S.C. § 10136(a) (1982).

[19] *See id.*

[20] *See* 42 U.S.C. § 10137(a) (1982).

[21] 42 U.S.C. § 10137(b), (c) (1982).

[22] *See* 42 U.S.C. § 10136(b)(1) (1982).

[23] *See* 42 U.S.C. § 10135(c), (d), & (e) (1982).

[24] *See* 42 U.S.C. § 10161(b)(1), (b)(2)(C), (c)(2) (1982).

If Congress authorizes the construction of an MRS facility, two additional steps are required before the facility can be constructed. First, the Secretary must prepare a qualified environmental impact statement.[25] Second, the MRS must be licensed by the Nuclear Regulatory Commission.[26] Finally, should Congress authorize construction of an MRS facility, the Secretary must commence making annual impact aid payments drawn from the Nuclear Waste Fund[27] "to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and subsequent operation" of an MRS facility.[28]

III.

Justiciability

Extraordinary remedies are requested. The State of Tennessee asks the Court to grant a declaratory judgment that the Secretary violated the consultation and cooperation requirements of section 117 of the Act, 42 U.S.C. § 10137, in conducting a study of three sites in Tennessee for the purpose of determining their suitability for an MRS facility without any type of state participation in the study.[29] The State also requests that the Court issue an injunction against the Secretary to prevent him from relying upon any part of this study in making his MRS proposal to Congress. The State further seeks partial summary judgment on its first cause of action, its challenge to

---

[25] *See* 42 U.S.C. § 10161(c)(2) (1982). The environmental impact statement must comply with the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1982); however, the statement need not consider the need for the MRS facility. 42 U.S.C. § 10161(c)(2) (1982).

[26] *See* 42 U.S.C. § 10161(d) (1982).

[27] *See* 42 U.S.C. § 10222(i) (1982).

[28] *See* 42 U.S.C. § 10161(f)(1) (1982).

[29] The study referred to is the "Screening and Identification Study," described in note 12 *supra*.

the siting process followed by the Secretary. The Secretary counters that this issue is not ripe for judicial review.[30] An essential consideration in determining whether a declaratory judgment may be granted is whether the matter is "ripe" for review.

A. *Ripeness*

The ripeness doctrine rests both on concepts embodied in Article III of the Constitution and on discretionary policy. *See, e.g., Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.) *cert. denied,* ____ U.S. ____ 106 S.Ct. 344, 88 L.Ed.2d 291 (1985); *Johnson v. Sikes,* 730 F.2d 644, 648 (11th Cir. 1984). It is invoked to determine whether a dispute has matured to the point that it warrants judicial resolution. *See, e.g., Brown,* 763 F.2d at 801 (quoting 13A Wright, Miller & Cooper, *supra,* § 3532). Although the law of ripeness was "once a tangle of specialistic rules and legalistic distinctions, [it] is now very much a matter of practical common sense." *Continental Air Lines, Inc. v. Civil Aeronautics Board,* 522 F.2d 107, 124 (D.C. Cir. 1974). Applying this common sense approach to the present action, the Court finds that the matter is ripe for review.

---

[30] The Secretary asks that he be awarded partial summary judgment on the State's first cause of action on the basis that it is not ripe for judicial resolution. The Secretary requests an inappropriate remedy. Actions which are not ripe for review shall be dismissed without prejudice, and later may be reasserted. For an example of this general principle, *see Brown v. Ferro Corp.*, 763 F.2d 798 (6th Cir.), *cert. denied,* ____U.S. ____, 106 S.Ct. 344, 88 L.Ed.2d 291 (1985). Defendant's motion for partial summary judgment must, therefore, be denied.

On the other hand, the State argues that the issue of ripeness is inappropriate for consideration on summary judgment, and therefore the Secretary has waived any objection to the ripeness of the issue by failing to present this argument in his motion to dismiss the complaint for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). Since this issue may be dispositive of the action, the Court shall consider it here.

In *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), the leading exposition of the ripeness doctrine, the Supreme Court stated:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is safe to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Id. at 148-49, 87 S.Ct. at 1515-16, 18 L.Ed.2d at 691 (footnote omitted), *quoted in Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n,* 461 U.S. 190, 200-01, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752, 763 (1983). The *Abbott Laboratories* Court further stated that the question of ripeness turns on the assessments of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 148, 87 S.Ct. at 1516, 18 L.Ed.2d at 691. *See, e.g., Pacific Gas,* 461 U.S. at 201, 103 S.Ct. at 1720, 75 L.Ed.2d at 763 (quoting *Abbot Laboratories); Brown,* 763 F.2d at 801 (quoting *Abbott Laboratories); Young v. Klutznick,* 652 F.2d 617, 625 (6th Cir. 1981), *cert. denied,* 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (citing *Toilet Goods Association v. Gardner,* 387 U.S. 158, 162, 87 S.Ct. 1520, 1523, 18 L.Ed.2d 697, 701 (1967)).

In arguing that this question is not ripe for review, the DOE relies ona four-part test stated in *Texas v. DOE,* 764 F.2d 278 (5th Cir.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 531, 88 L.Ed.2d 463 (1985). In *Texas,* the State of Texas sought review

of the DOE's designation pursuant to section 116(a) of the Act, 42 U.S.C. § 10136(a), of two sites within the state as "potentially acceptable" for development as permanent repositories. The agency action challenged in *Texas* occurred at the very first stage of the site selection process under the NWPA. The court set forth the familiar Fifth Circuit test, citing *Abbott Laboratories,* 387 U.S. at 149-54, 87 S.Ct. at 1515-18, 18 L.Ed.2d at 691-95, which provides that four factors are relevant in determining whether an action is ripe:

> (1) whether the issues presented are purely legal; (2) whether the challenged agency action constitutes "final agency action" within the meaning of the APA; (3) whether the challenged action had or will have a direct and immediate impact on the petitioner; and (4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

Texas, 764 F.2d at 283. *See, e.g., Pennzoil Co. v. Federal Energy Regulatory Comm'n ("FERC"),* 742 F.2d 242, 244 (5th Cir. 1984); *Pennzoil Co. v. FERC,* 645 F.2d 394, 398 (5th Cir. 1981); *Ecee, Inc. v. FERC,* 611 F.2d 554, 556 (5th Cir. 1980). Assuming for the sake of argument that the challenged action was "final,"[31] the court held that none of the other criteria necessary for ripeness were met.

---

[31] The court earlier had concluded that agency action would not be "final" until the nominations of five sites suitable for "site characterization" were made pursuant to section 112 of the Act, 42 U.S.C. § 10132. Each nomination was required to be accompanied by an environmental assessment of that site. 42 U.S.C. § 10132(b)(1)(E) (1982). One factor relevant to the decision was the fact that Congress, in 42 U.S.C. § 10132(b)(1)(F)(i) specified the issuance of any environmental assessment to be a final agency action subject to judicial review in accordance with 42 U.S.C. § 10139 and the APA. *See Texas,* 764 F.2d at 282. The Court stated that the State could reassert its challenge after the nomination of Texas sites, if any was made. *Id.*

The *Texas* court found that the issues presented were not purely legal because judicial review of the Secretary's site screening process would be more meaningful after the environmental assessments were completed. The Court further stated that the Secretary's decision did not have the requisite "immediate and direct impact" on the petitioners, 764 F.2d at 284 (citing *FTC v. Standard Oil Co.,* 449 U.S. 232, 244, 101 S.Ct. 488, 495, 66 L.Ed.2d 416, 426-27 (1980), because the State and its citizens could attempt to influence the Secretary's decision through the public hearing process established in section 112(b)(2) of the Act, 42 U.S.C. § 10132(b)(2). Finally, the court stated that judicial review at this early stage would interfere with the administrative process underway in Texas by delaying the siting process and encouraging the petitioners to forego their public hearing opportunities. *Texas,* 764 F.2d at 284.

While courts in this circuit focus on the *Abbott Laboratories* two-prong analysis in making a ripeness determination (i.e., that of requiring an inquiry into both the "fitness of the issues" for judicial resolution and "the hardship to the parties" if judicial relief is denied at that stage, 387 U.S. at 149, 87 S.Ct. at 1515, 18 L.Ed.2d at 691,)[32] they recognize that numerous factors may be relevant in this determination, including those enumerated by the *Texas* court. *See, e.g., Allstate Insurance Co. v. Wayne County,* 760 F.2d 689, 696-97 (6th Cir. 1985) (review of factors considered by courts); *Cumberland Capital Corp. v. Harris,* 490 F.Supp. 551, 556-57 (M.D. Tenn. 1977), *rev'd on other grounds,* 621 F.2d 246 (6th Cir. 1980).

First, the court concludes that the issue before it is a purely legal question. The DOE claims that the Court does not have a complete and "specific [factual] framework within which the [DOE's] decision can properly be evaluated," *Texas,* 764 F.2d at 284, because at the time of its response to the summary judg-

---

[32] *See, e.g., Brown,* 763 F.2d at 807 (Merritt, J., dissenting).

ment motion, neither the environmental assessment nor the final MRS proposal had been completed.[33] These studies, however, are not relevant to the Court's determination of whether the Secretary violated the consultation and cooperation requirements of the Act. The Secretary asserts that the language of section 141(h) of the Act, 42 U.S.C. § 10161(h), demonstrates that the incorporated provisions take effect only after Congress authorizes the construction of an MRS facility. The State flatly denies this. Whether or not the Secretary actually has complied with the statutory requirements does not affect the determination of ripeness. Only the propriety of a declaratory judgment is affected.

Second, it is clear that this action survives the hurdle of finality. The Secretary argues that no "final" agency action has occurred within the meaning of the Administrative Procedures Act because the siting study which was completed prior to notification of the State of Tennessee[34] was merely a "procedural step in an as yet uncompleted process."[35] Whether or not this study by itself was a final action is a moot question, because the circumstances have changed in this case. "[R]ipeness is peculiarly a question of timing," *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 140, 95 S.Ct. 335, 337, 42 L.Ed.2d 320, 351 (1974), *quoted in Allstate Insurance Co.*, 760 F.2d at 696; therefore, it is the present situation, rather than the situation at the time the dispositive motion and responses were filed, that must govern. The DOE com-

---

[33] At the time of the issuance of this opinion, both studies in fact have been delivered to the Administrator of the Environmental Protection Agency and the Commissioner of the Nuclear Regulatory Commission as required by section 141(b)(3) of the Act, 42 U.S.C. § 10161(b)(3), and to Tennessee officials. *See* Plaintiff's Exhibit H.

[34] The study referred to is the "Screening and Identification Study," described in note 12 *supra*.

[35] Defendant's Response at 11.

pleted the draft MRS proposal and environmental assessments of the Tennessee sites in final form in December, 1985.[36] Shortly after February 6, 1986, the Secretary plans to submit these studies in their present form to Congress as required by section 141(b) & (c) of the Act, 42 U.S.C. § 10161(b) & (c), and he has stated that he will also transmit to Congress any comments which the State of Tennessee would care to submit.[37] The State seeks to enjoin the presentation of the siting studies which it contends are fatally flawed and are final.

The Court agrees that the MRS siting process is not yet complete, because Congressional authorization and the completion of an environmental impact statement are required before such a facility may be built. The proposal for the construction of an MRS facility in Tennessee, which has been completed for presentation to Congress, satisfies the finality requirement. This proposal is a definitive recommendation of a federal agency to Congress, not an informal or tentative action.[38] Unless this

[36] *See Monitored Retrievable Storage Submission to Congress,* DOE/RW (review copy) (Dec. 1985) (Plaintiff's Exhibit J).

[37] *See* Plaintiff's Exhibit H (letter from Ben Rusche to James Word).

[38] This study is tentative in the respect that the Secretary does not have the authority unilaterally to implement the proposal. It is, however, a definitive statement of the Department of Energy's position. *Compare Abbott Laboratories,* 387 U.S. at 151, 87 S.Ct. at 1517, 18 L.Ed.2d at 693 (regulation which was promulgated by formal rulemaking procedures, was made effective upon publication, and with which compliance was expected was not informal or tentative); *Independent Bankers Ass'n of America v. Smith,* 534 F.2d 921, 928-29 (D.C. Cir.), *cert. denied,* 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976) (although the Comptroller of the Currency's interpretative ruling was not issued after formal notice-and-comment hearings, his ruling was just as "definitive" as the regulation in *Abbott Laboratories,* meaning that "administrative reconsideration of the ruling seems quite unlikely," *id.* at 929, considering the Comptroller's rejection of a request for such rulemaking proceedings).

Court considers Tennessee's complaint now, the State will be deprived of the opportunity to correct the defects in the siting study upon which the proposal is based. Otherwise, the DOE's recommendation of Tennessee as the preferred site for MRS will be a *fait accompli*. Based on the preceding discussion, it is clear that the final draft proposal is a final determination by the DOE sufficient to support a conclusion that this action is ripe for consideration. This analysis comports with the "pragmatic" and "flexible" view of finality expressly approved by the Supreme Court in *Abbott Laboratories* with respect to the review of administrative actions.[39] *See also Nevada v. Herrington*, 777 F.2d 529, 535 (9th Cir. 1985) (in an appeal from the Secretary's final decision to deny reimbursement of the state's expenditures on siting studies designed to evaluate the DOE's repository studies, the internal agency guidelines relied upon in the decision could be reviewed as "a definitive statement of the agency's position").

Third, the Court must balance the hardships to the parties of withholding court consideration. The Secretary's siting study obviously has a direct and immediate impact on the State of Tennesse. The State seeks to prevent the Secretary's use of an allegedly deficient study for the purpose of convincing the members of Congress that not only is MRS required as part of the national waste management program, but also that such a facility should be built in Tennessee. The effects of the Secretary's recommendation may have a substantial impact on Tennessee. The State faces immediate harm because it has no other recourse in challenging the position taken by the DOE study. The fact that the DOE will transmit the State's comments to Congress does nothing to negate the hardship to the

---

[39] 387 U.S. at 149-50, 87 S.Ct. at 1515, 18 L.Ed.2d at 691-92 (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198, 76 S.Ct. 763, 768, 100 L.Ed. 1081, 1088 (1956); *Frozen Food Express v. United States*, 351 U.S. 40, 45, 76 S.Ct. 569, 572, 100 L.Ed. 910, 915 (1950); *& Columbia Broadcasting System v. United States*, 316 U.S. 407, 418-19, 62 S.Ct. 1194, 1200-01, 86 L.Ed. 1563, 1571 (1942)).

State. Tennessee faces the immediate threat of irrevocable injury because of its designation as the state containing the three "preferred" sites for such a facility.

On the other side of the scale, the Court finds little, if any, hardship to the Secretary in granting court consideration of the issue. The Secretary can only profit from an early determination of the issue, which will eliminate the cloud of speculation over the validity of its study.

Fourth, judicial review at this juncture will not interfere with the administrative decision-making process. The Secretary has made his determination as to which sites to recommend. The Secretary complains merely about the result which may be reached. Requiring the Secretary to delay the presentation of his MRS proposal to Congress until he has complied with the consultation and cooperation requirements would merely delay the presentation of the proposal. In light of the fact that Congress ordered that the MRS proposal be presented by June 1, 1985, *see* 42 U.S.C. § 10161(h)(1), and that the Secretary has delayed his presentation until eight months after its required deadline due to his inability to complete the proposal, the effect of a further short delay would be *de minimus*. If the Secretary is found to have violated the statute, the administrative process will be better served if the Secretary is required to correct his errors. Thus, the balance of hardship, along with an evaluation of the fitness for review of the issue presented, lead to the conclusion that the plaintiff's challenge presents a justiciable case or controversy for judicial resolution.

B. *Declaratory Judgment*

The Declaratory Judgment Act allows the federal courts in their "sound discretion," *Grand Trunk Eastern Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 325 (6th Cir. 1984),[40] to

---

[40] Citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2759, at 645 (1983). *See, e.g., Public Affairs Associates,*

render declaratory judgments only where there exists an "actual controversy." 28 U.S.C. § 2201 (1982).[41] The classic statement of the constitutional and statutory test is that a federal district court may grant declaratory relief only if there is a substantial controversy of sufficient immediacy between parties having adverse legal interests. *See, e.g., Lake Carriers' Association v. MacMullan,* 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257, 266 (1972) (quoting *Maryland Casualty Co. v. Pacific Coal & Gas Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed.2d 826, 829 (1941)); *Golden v. Zwickler,* 394 U.S. 103, 108, 89 S.Ct. 956, 959-60, 22 L.Ed.2d 113, 118 (1969); *Sullivan v. Division of Elections,* 718 F.2d 363, 365 (11th Cir. 1985); *Crossen v. Breckenridge,* 446 F.2d 833, 838 (6th Cir. 1971), *vacated,* 410 U.S. 950, 93 S.Ct. 1413, 35 L.Ed.2d 683 (1973). A justiciable controversy exists in this action.

In determining whether a declaratory ruling is appropriate, the court must apply the following general principles:

> The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when

---

Inc. v. Rickover, 369 U.S. 111, 112, 82 S.Ct. 580, 582, 7 L.Ed.2d 604, 606 (1962); *Southeastern Promotions, Ltd. v. Conrad,* 486 F.2d 894, 901 (6th Cir. 1974), *rev'd on other grounds,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

[41] The latter requirement is a "jurisdictional prerequisite of constitutional dimensions," *Crown Drug Co. v. Revlon, Inc.,* 703 F.2d 240, 243 (7th Cir. 1983) (quoting *Grafton Corp. v. Hausermann,* 602 F.2d 781, 783 (7th Cir. 1979), which incorporates the "case or controversy" requirement of Article III, § 2, cl. 1, of the U.S. Constitution into the remedy of declaratory judgment. *See, e.g., Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 239-40, 57 S.Ct. 461, 463, 81 L.Ed. 617, 621 (1937); *Interdynamics, Inc. v. Wolf,* 698 F.2d 157, 166 (3d Cir. 1982).

> neither of these results can be accomplished, the court should decline to render the declaration prayed.

E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941), *quoted in Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). *See also* 10A Wright, Miller & Kane, *supra*, § 2759, at 647. The Court will exercise its discretion in applying these principles to the following analysis of the NWPA.[42]

IV.

Statutory Construction

Two issues of construction are presented in this case of first impression: (1) When do the consultation and cooperation requirements of section 117 take effect in the MRS siting process? and (2) What consultation and cooperation requirements apply to the MRS siting process? Unfortunately, the inartful drafting of the NWPA makes the search for the answers to these questions more difficult than it should be.

A. *When*

The provision under scrutiny is section 141(h) of the Act, 42 U.S.C. § 10161(h), which states in applicable part that "[a]ny facility authorized pursuant to this section shall be subject to" the provision of section 117, 42 U.S.C. § 10137. As noted

---

[42] The Supreme Court has warned against a grant of declaratory judgment involving an important question of public law on the basis of a sparse and inadequate record. *See, e.g., Askew v. Hargrave*, 401 U.S. 476, 478-79, 91 S.Ct. 856, 858, 28 L.Ed.2d 196, 199 (1971); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 330-31, 82 S.Ct. 337, 341-42, 7 L.Ed.2d 317, 322-23 (1962); *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 582, 7 L.Ed.2d 604, 606 (1962). This danger is non-existent in this action as is evidenced by the thousands of pages of "administrative record" which has been filed with this Court, and because the facts are undisputed.

earlier, the Secretary, focusing on the term "authorized," urges the Court to adopt the view that the consultation and cooperation requirements of section 117 of the Act, 42 U.S.C. § 10137, which are incorporated in section 141, apply only after Congressional authorization of an MRS facility. The State, taking the position that the term "authorized" refers to an MRS facility "generally contemplated for study and development by the Secretary and presentation to Congress,"[43] argues that section 117's requirements take effect early in the MRS siting process.

1. *Statutory Language*

Established rules of statutory construction requre that the Court look first at the language of the statute, and if that is plain, then the Court must enforce it according to its terms. *See, e.g., Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 110, 103 S.Ct. 986, 990, 74 L.Ed.2d 845, 853 (1983); *United States v. Graham Mortgage Corp.,* 740 F.2d 414, 417 (6th Cir. 1984); *Henry T. Patterson Trust v. United States,* 729 F.2d 1089, 1094 (6th Cir. 1984). Further, where a statute is clear and unambiguous on its face, a court ordinarily will not look to the legislative history to change the statute's application. *See Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633, 638 (1981); *Henry T. Patterson Trust,* 729 F.2d at 1094; *Pope v. Rollins Protective Services Co.,* 703 F.2d 197, 206 (5th Cir. 1983); *Hilliard v. United States,* 310 F.2d 631, 632 (6th Cir. 1962).

However, section 141(h) is susceptible to contradictory interpretations. It is true, as defendant points out, that in each of the six other instances in section 141 (other than subsection (h)) in which the term "authorized" was used, *congressional*

---

[43] Plaintiff's Memorandum at 34.

authorization of an MRS facility was the meaning intended.[44] In each of these instances, however, that meaning was either specifically stated or clearly could be inferred from the language of the statute because prior Congressional involvement was necessary to implementation of the particular procedure (i.e., the environmental impact statement and facility licensing).[45] Because the provisions incorporated in section 141(h) are capable of application both before and after Congressional authorization, the section is not unambiguous on its face. Where, as in this case, the literal language of the statute does not conclusively reveal the intent of Congress, courts must look beyond the literal meaning and analyze the particular provision in context with the whole. *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S.Ct. 2431, 2436, 41 L.Ed.2d 374, 381 (1974); *In re Arnett,* 731 F.2d 358, 361 (6th Cir.1984). Thus, the Court must examine the Act's legislative purpose in order to interpret and apply section 141(h).

2. *Statutory Purpose*

The primary function of the courts in applying statutory enactments is to effectuate the intent of the legislature. *Philbrook v. Glodgett,* 421 U.S. 707, 713, 95 S.Ct. 1893, 1898,

---

[44] *See* 42 U.S.C. § 10161(b)(2)(C) (1982) (twice referring to "congressional authorization"); 42 U.S.C. § 10161(c)(2) (1982) (requiring that a qualified environmental impact statement be prepared "[i]f the Congress by law ... specifically authorizes construction" of MRS). 42 U.S.C. § 10161(d) (1982) (stating that "any facility authorized pursuant to this section" shall be subject to the licensing requirements of 42 U.S.C. § 5842(2)); 42 U.S.C. § 10161(e) (1982) (stating that alternative facility designs for the temporary storage of nuclear waste could be considered in any environmental impact statement or licensing procedure of the NRC); 42 U.S.C. § 10161(f)(1) (1982) (requiring the Secretary to make financial impact aid available being informed of congressional authorization of the construction of an MRS facility).

[45] *See id.*

44 L.Ed.2d 525, 533 (1975); *In re Arnett,* 731 F.2d at 360. This responsibility is especially important when, as in the instant case, the Court must reconcile arguably contradictory passages of a statute for which the intent of the legislature is clear but the envisioned implementation is "somewhat faulty." *Atwell v. Merit Systems Protection Board,* 670 F.2d 272, 286 (D.C.Cir.1981). Thus, the question of when the consultation and cooperation requirements of section 117 apply to the MRS siting process must be considered in light of the expressed purposes of the NWPA.

Congress clearly intended for the states to play an active role in the MRS siting process. The legislative history of the NWPA reflects a desire on the part of Congress to provide "public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated." H.R.Rep. No. 491, 97th Cong., 1st Sess. 30, *reprinted in* 1982 *U.S.Code Cong. & Ad. News,* 3792, 3796. Although the primary legislative committee report does not mention state participation in MRS siting specifically,[46] it is

---

[46] The legislative history's section-by-section analysis of the NWPA states with respect to the MRS provision:

> Section 134 [section 141 of the Act] requires the Secretary to submit to Congress a proposal for construction of one or more storage facilities for civilian high level waste or spent fuel designed to store such fuel or waste for the foreseeable future. The section also sets out certain exemptions, licensing requirements and state assistance programs which would be applicable to a program to construct such a facility if such a program were ever authorized by Congress.

H.R.Rep. No. 491, 97th Cong., 1st Sess. 63, *reprinted in* 1982 *U.S.Code Cong. & Ad.News* 3792, 3829. The State ably chronicles the efforts made by Congress in 1982 to enact comprehensive nuclear waste legislation, focusing on the state participation requirements in various versions of the legislation. Arguing that its interpretation of section 141 is consistent with the legislative history of the NWPA, plaintiff describes the history of the participation requirements as

follows:

> Prior to passage of the Act in its present form, both the House and the Senate of the 97th Congress passed separate and different versions of a comprehensive nuclear waste law. The Senate acted first with passage of S 1662 on April 29, 1982. [S 1662, 97th Cong., 1st Sess. (1982),] 128 Cong.Rec. S 4325 (Apr. 29, 1985). S 1662 provided for both a repository and an MRS. This initial version of the Senate bill left little doubt that a State affected by an MRS was to have the same rights as a repository state. Section 701(a) of the proposed legislation required the Secretary of DOE to identify within 90 days of the law's passage acceptable repository *and* MRS sites. *Id.* at 4334. Section 701(b) went on to provide that each state so identified for a repository or MRS
>
> ... shall have the right to participate in a process of consultation and concurrence, based on public health and safety and environmental concerns in *all stages* of the planning, siting, development, construction, operation, and closure of a *repository or a Monitored Retrievable Storage facility*. . . . *Id.* (Emphasis supplied). Section 701(c) of S 1662 contained a provision similar to the present Act whereby the consultation and concurrence process could be reduced to a written agreement. *Id.*
>
> On December 6, 1982, the House passed its own version of a comprehensive high-level radioactive waste disposal act in H.R. 3809. This bill resembled very closely the current Act. Unlike S 1662, it treated the MRS and repository in separate provisions. A provision for consultation and cooperation was included for states affected by a repository site. It was virtually identical to [section 117(b)] of the current Act, [42 U.S.C. § 10137(b)]. H.R. 3809, however, contained no provision requiring DOE to consult and cooperate with affected states in the MRS siting process. This shortcoming in the House version was eventually corrected.
>
> At the eleventh hour of the 97th Congress, a *third* version of a comprehensive nuclear waste law was introduced into the Senate as a "substitute" version of H.R. 3809. [S. 968, 97th Cong., 2d Sess., 128 Cong.Rec. 15,621 (1982)]. It was this "substituted H.R. 3809" that was enacted as the current Act. On the day that substituted H.R. 3809 was passed in the Senate, December 20,

clear that the level of state and public participation in the MRS siting process was intended by Congress to be no less than that accorded the states and public in the process of siting the permanent repositories. In offering an amendment to the reported House bill, Senator McClure added what is now subsection (h) of section 141, 42 U.S.C. § 10161(h), which makes the consultation and cooperation requirements of the repository siting process applicable to the MRS siting process. He explained the purpose of his amendment:

> Full state participation is provided for the MRS program in exactly the same way as it is provided in the case of repository sites.

128 Cong.Rec. S15,642 (1982) (daily ed. Dec. 20, 1982) (statement of Sen. McClure). Similarly, Senator Kasten stated that this and several other amendments to the proposed bill would give states "a strong role in nuclear waste siting decisions." *Id.* at S15,668 (statement of Sen. Kasten). He further stated:

> The Department of Energy cannot be allowed to build a disposal facility without giving the states a meaningful role in the siting and construction decisions.

> 1982, the bill also went to the House where, after brief debate, it was passed with the entire Senate amendments intact by a vote of 256 to 32. [H.R. 3809, 97th Cong., 2d Sess., 128 Cong. Rec. 10,524 (1982).] The President signed the legislation into law on January 9, 1983.

Plaintiff's Memorandum at 28-31 (footnotes omitted).

It should surprise no one that Congress has considered waste legislation for several years, and has examined the type of participation by the states which would be most efficient. Congress actually explored the concept of placing an absolute veto power in the hands of the states to be exercised in connection with the siting of an MRS facility within their jurisdiction. For an example of this, *see Nuclear Waste Facility Siting, 1979: Oversight Hearing Before the Subcomm. on Energy & the Environment of the House Comm. on Interior & Insular Affairs,* 96th Cong., 1st Sess. (1979).

> A long-range nuclear waste disposal program is critical to our nation's energy future, and . . . the proper role of States in the siting of disposal facilities is critical to the success of this program. The only successful nuclear waste disposal program will be one which matches national policy needs with local citizen concerns.

Id. Senator Jackson, referring to repositories, added that state participation and disapproval requirements were inserted in the NWPA to address the concerns of states and citizens that shortcuts would not be taken, and that there would be a clear set of procedures for the DOE to follow in siting an MRS facility. *Id.* at S16,666 (statement of Sen. Jackson). With that general purpose in mind, the Court rejects the Secretary's argument that the state has no formal participation and disapproval rights until after Congress authorizes MRS construction.

The legislative history and the statutory language of the NWPA dictate the conclusion that the provisions incorporated in section 141(h) of the Act, 42 U.S.C. §10161(h), must be given effect prior to Congressional authorization of MRS construction. This result is consistent with the goals the statute is attempting to achieve, while the Secretary's interpretation by contrast would frustrate the express will of Congress. Thus, the term "authorized" in section 141(h) must assume the meaning advanced by the State, referring to a facility "generally contemplated for study and development by the Secretary and presentation to Congress," rather than the narrow meaning advanced by the Secretary.[47] This interpretation of the statute also is supported by the legislative history of the Senate predecessor bill, which stated that states "should be entitled to the broadest possible rights and opportunities to participate in the development of the facilities.... The Committee expects this fundamental principle to govern any interpretation, including judicial interpretations...." S.Rep. No. 282, 97th Cong., 1st Sess. 28 (1981).

---

[47] Plaintiff's Memorandum at 34.

The interpretation also assures states of substantive rights in the MRS siting process and, the Court believes, achieves a measure of harmony between the repository provisions and the MRS provisions. *Compare Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-32, 93 S.Ct. 2469, 2484, 37 L.Ed.2d 207, 224 (1973); *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184 (6th Cir.1982), *aff'd*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984) (stating that a court should read and construe a statute as a whole and, if possible, give it a harmonious, comprehensive meaning).

If the provisions of section 141(h) were to take effect only after Congressional authorization of an MRS facility, the state's rights to participate in consultation and cooperation procedures with the DOE, to receive formal notice that a site had been identified within its borders, and to disapprove a proposed site would be rendered meaningless. Such a result not only would vitiate the expressed purposes of the NWPA, but also would breach the judicial goal of giving effect, if possible, to every part of a provision so that no part will be "inoperative or superfluous, void or insignificant." *Norfolk & Western Railway Co. v. United States*, 768 F.2d 373, 379 (D.C.Cir.1985). *See, e.g., In re Arnett*, 731 F.2d at 361 (citing *Jarecki v. Searle & Co.*, 367 U.S. 303, 307-08, 81 S.Ct. 1579, 1582-83, 6 L.Ed.2d 859, 863 (1961)).

3. *Declaratory Judgment*

Because the Court has found that this action is justiciable and for the reasons of construction set forth herein, the Court issues a declaratory judgment that the provisions of section 141(h), take effect prior to the time of congressional authorization of the construction of an MRS facility. Therefore, the Secretary is required to comply with the consultation and cooperation requirements of section 117 prior to Congressional authorization of MRS.

B. *What*

Except for their basic disagreement as to when the provisions of section 141(h) become applicable in the MRS siting process, the parties essentially agree that the requirements of section 117(b), 42 U.S.C. § 10137(b), govern the consultation and cooperation procedures between the state and the Secretary.[48] To the extent that the parties have not concurred, the Court must compare the repository provisions and examine the legislative intent to determine what portion of section 117 applies to the MRS siting process. This issue would be an apt illustration of Chief Justice Marshall's statement that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived...." *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805), *quoted in Stauffer Chemical,* 684 F.2d at 1183. The Secretary's obligation to consult and cooperate with the state affected by the final repository siting process is triggered in one of two ways. First, these requirements arise upon designation by the President of a site for "site characterization."[49] Second, the consultation and cooperation requirements arise upon the written request of a state which has been identified as having a potentially acceptable site pursuant to section 116(a) of the Act.[50] Within sixty

---

[48] *See* Plaintiff's Memorandum at 19-24; *Monitored Retrievable Storage Submission to Congress,* DOE/RW, vol. 1, at 32-33 (Dec. 1985) (review copy).

[49] 42 U.S.C. § 10137(b) (1982). Under the repository siting scheme, the Secretary recommends sites to the President, who decides whether to approve or disapprove such candidate sites for "site characterization." 42 U.S.C. § 10132(c) (1982). Site characterization includes an extensive study into the geologic condition of the candidate site. 42 U.S.C. § 10101(21) (1982). Site characterization is conducted prior to the nomination of a site by the President to Congress.

[50] *See* 42 U.S.C. § 10137(c)(2) (1982).

days after either of these "triggering" events occurs, the Secretary must attempt to enter into a binding written agreement with the state which at a minimum sets forth the procedures under which the information exchange and consultation and cooperation requirements of sections 117(a) and 117(b) shall be executed. This agreement must cover several broad areas specified in section 117(c)(1)—(11), including "resolving" state objections to planning and siting, negotiating the procedures by which the state may monitor the ongoing activities at the site, and working out the schedule for the State's review of each of the key events in the repository study process.

The Court finds that the application of the consultation and cooperation requirements of section 117(b) to MRS serves to achieve the NWPA's goals of involving the state in the MRS siting process. Since the process of siting an MRS facility does not involve "site characterization" as required by section 117(b), the consultation and cooperation requirements will arise upon the performance of "any" study of a site. Therefore, the Court issues a declaratory judgment that *any* study of an area within a state for a possible MRS site requires consultation and cooperation with the state under section 117(b), 42 U.S.C. § 10137(b). This conclusion, the Court believes, helps bring consistency and harmony to the statute.

V.

Summary Judgment

A. *Facts*

Applying these conclusions to the undisputed facts of the case, the Court must consider the merits of the State's motion for partial summary judgment, which is based on the theory that the Secretary had violated the notification and consultation and cooperation requirements of sections 116(a) and 117 of the Act, 42 U.S.C. §§ 10136(a) & 10137. In resolving a motion for

summary judgment, the Court must determine whether the materials before the Court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *SEC v. Blavin,* 760 F.2d 706, 710 (6th Cir.1985). The Court finds that summary judgment must be granted to the plaintiff.

In this action, the facts are undisputed and the law is clear. Section 116(a) of the Act, 42 U.S.C. § 10136(a), by incorporation in section 141(h), requires that the Secretary notify the Governor and legislature of an affected state within ninetyndays of identifying potentially acceptable MRS sites within their jurisdiction. The Secretary failed to notify any Tennessee official that the siting studies were in progress. Although a violation of section 116(a) has occurred, no relief is necessary, because Tennessee now has constructive notice that it has been so identified.

Section 117(b) of the Act, 42 U.S.C. § 10137(b), by incorporation in section 141(h), requires the Secretary to "consult and cooperate" with the Governor and legislature "in performing any study" of a site for the purpose of determining whether that site is suitable for an MRS facility. The "Screening and Identification Study"[51] prepared by the DOE clearly constitutes a "study" developed "for the purpose of determining the suitability" of a site. *See* 42 U.S.C. § 10137(b) (1982). The facts demonstrate that the Secretary made no effort whatsoever to consult and cooperate with the executive and legislative branches of the Tennessee government in conducting the study. Neither did the Secretary attempt to negotiate a binding written agreement with the state to effectuate the consultation and cooperation contemplated by section 117(b).

---

[51] *See Screening and Identification of Sites For a Proposed Monitored Retrievable Storage Facility,* DOE/RW 0023 (Apr. 1985) (Plaintiff's Exhibit D; Defendant's Exhibit C).

The Court renders a declaratory judgment that the defendant, in preparing the "Screening and Identification Study," violated section 117(b) of the Nuclear Waste Policy Act, 42 U.S.C. § 10137(b), by failing to cooperate and consult with the Governor and legislature of the State of Tennessee in its preparation. There being no material facts in dispute, the Court grants partial summary judgment on its first cause of action to the plaintiff.

VI.

Injunctive Relief

Having exercised its discretion in rendering a declaratory judgment on the construction of section 141(h) of the NWPA, 42 U.S.C. § 10161(h), and having declared illegal the Secretary's failure to consult and cooperate with the State of Tennessee pursuant to section 117(b) of the Act, 42 U.S.C. § 10137(b), the Court is empowered to grant "[f]urther necessary or proper relief" to effectuate the judgment. 28 U.S.C. § 2202 (1982). While this Court undoubtedly has the power to grant injunctive relief against the defendant, such relief does not appear to be necessary at this time. Absent proof or allegation that the Secretary will not abide by the declaratory judgment, the Court may assume that the defendant will proceed in good faith, and in a manner which is consistent with the declaratory judgment without the coercion of an injunction. *See, e.g., Poe v. Gerstein,* 417 U.S. 281, 94 S.Ct. 2247, 41 L.Ed.2d 70, (1974); *Bryant v. Blanton,* 463 F.Supp. 155, 157-58 (W.D.Tenn.1979). This result, however, in no way affects the State's right to seek additional relief if it should become apparent at a later time that the Secretary plans to proceed with the MRS proposal in its present form[52] in disregard of the declaratory judgment.

It is so ORDERED.

---

[52] *See Monitored Retrievable Storage Submission to Congress,* DOE/RW (review copy) (Dec. 1985) (Plaintiff's Exhibit J).

ORDER

In accordance with the accompanying Memorandum, the Court issues a declaratory judgment that the provisions of section 141(h) of the Nuclear Waste Policy Act, 42 U.S.C. § 10161(h), take effect prior to the time of congressional authorization of construction of an MRS facility. The Court also grants a declaratory judgment that any study of an area within a state for a possible MRS site requires consultation and cooperation with the state under section 117(b) of the Act, 42 U.S.C. § 10137(b).

Furthermore, the Court renders a declaratory judgment that the defendant, in preparing the "Screening and Identification Study,"[1] violated section 117(b) of the Act, 42 U.S.C. § 10137(b), by failing to consult and cooperate with the Governor and legislature of the State of Tennessee. Accordingly, the Court grants summary judgment to the State of Tennessee on its first cause of action.

---

[1] *See Screening and Identification of Sites For a Proposed Monitored Retrievable Storage Facility,* DOE/RW 0023 (Apr. 1985) (Plaintiff's Exhibit D; Defendant's Exhibit C).

APPENDIX D

42 U.S.C. § 10137. Consultation with States and affected Indian tribes

(a) Provision of information

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(2) Upon written request for such information by the Governor or legislature of such State, or by the governing body of any affected Indian tribe, as the case may be, the Secretary shall provide a written response to such request within 30 days of the receipt of such request. Such response shall provide the information requested or, in the alternative, the reasons why the information cannot be so provided. If the Secretary fails to so respond within such 30 days, the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, may transmit a formal written objection to such failure to respond to the President. If the President or Secretary fails to respond to such written request within 30 days of the receipt by the President of such formal written objection, the Secretary shall immediately suspend all activities in such State authorized by this part, and shall not renew such activities until the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, has received the written response to such written request required by this subsection.

(b) Consultation and cooperation

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

(c) Written agreement

Not later than 60 days after (1) the approval of a site for site characterization for such a repository under section 10132(c) of this title, or (2) the written request of the State or Indian tribe in any affected State notified under section 10136(a) of this title to the Secretary, whichever, first occurs, the Secretary shall seek to enter into a binding written agreement, and shall begin negotiations, with such State and, where appropriate, to enter into a separate binding agreement with the governing body of any affected Indian tribe, setting forth (but not limited to) the procedures under which the requirements of subsections (a) and (b) of this section, and the provisions of such written agreement, shall be carried out. Any such written agreement shall not affect the authority of the Commission under existing law. Each such written agreement shall, to the maximum extent feasible, be completed not later than 6 months after such notification. If such written agreement is not completed within such period, the Secretary shall report to the Congress in writing within 30 days on the status of negotiations to develop such agreement and the reasons why such agreement has not been completed. Prior to

submission of such report to the Congress, the Secretary shall transmit such report to the Governor of such State or the governing body of such affected Indian tribe, as the case may be, for their review and comments. Such comments shall be included in such report prior to submission to the Congress. Such written agreement shall specify procedures—

(1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 10136(c) of this title or section 10138(b) of this title, as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable

periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;

(9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;

(10) for public notification of the procedures specified under the preceding paragraphs; and

(11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

APPENDIX E

42 U.S.C. § 10139. Judicial review of agency actions

(a) Jurisdiction of United States Courts of Appeals

(1) Except for review in the Supreme Court of the United States, the United States Courts of Appeals shall have original and exclusive jurisdiction over any civil action—

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this subtitle, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c)[1] Deadline for commencing action

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

---

[1] So in original. Section enacted without a subsection (b).

APPENDIX F

42 U.S.C. § 10161. Monitored retrievable storage

(a) Findings

The Congress finds that—

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in the section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this chapter should proceed regardless of any construction of a monitored retrievable storage facility pursuant to this section.

(b) Submission of proposal by Secretary

(1) On or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level

radioactive waste and spent nuclear fuel. Each such facility shall be designed—

(A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;

(B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;

(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and

(D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

(2) Such proposal shall include—

(A) the establishment of a Federal program for the siting, development, construction, and operation of facilities capable of safely storing high-level radioactive waste and spent nuclear fuel, which facilities are to be licensed by the Commission;

(B) a plan for the funding of the construction and operation of such facilities, which plan shall provide that the costs of such activities shall be borne by the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities;

(C) site-specific designs, specifications, and cost estimates sufficient to (i) solicit bids for the construction of the first such facility; (ii) support congressional authorization of the construction of such facility; and (iii) enable completion and operation of such facility as soon as practicable following congressional authorization of such facility; and

(D) a plan for integrating facilities constructed pursuant to this section with other storage and disposal facilities authorized in this chapter.

(3) In formulating such proposal, the Secretary shall consult with the Commission and the Administrator, and shall submit their comments on such proposal to the Congress at the time such proposal is submitted.

(4) The proposal shall include, for the first such facility, at least 3 alternative sites and at least 5 alternative combinations of such proposed sites and facility designs consistent with the criteria of paragraph (1). The Secretary shall recommend the combination among the alternatives that the Secretary deems preferable. The environmental assessment under subsection (c) of this section shall include a full analysis of the relative advantages and disadvantages of all 5 such alternative combinations of proposed sites and proposed facility designs.

(c) Environmental impact statements

(1) Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the Secretary implementing such Act [42 U.S.C.A. § 4321 et seq.], an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

(2) If the Congress by law, after review of the proposal submitted by the Secretary under subsection (b) of this section, specifically authorizes construction of a monitored retrievable

storage facility, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of such facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(d) Licensing

Any facility authorized pursuant to this section shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of the first such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(e) Clarification

Nothing in this section limits the consideration of alternative facility designs consistent with the criteria of paragraph (1) of subsection (b) of this section in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored, retrievable facility authorized pursuant to this section.

(f) Impact assistance

(1) Upon receipt by the Secretary of congressional authorization to construct a facility described in subsection (b) of this section, the Secretary shall commence making annual impact aid payments to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and subsequent operation of any such facility within the jurisdictional boundaries of any such unit.

(2) Payments made available to units of general local government under this subsection shall be—

(A) allocated in a fair and equitable manner, with priority given to units of general local government determined by the Secretary to be most severely affected; and

(B) utilized by units of general local government only for planning, construction, maintenance, and provision of public services related to the siting of such facility.

(3) Such payments shall be subject to such terms and conditions as the Secretary determines are necessary to ensure achievement of the purposes of this subsection. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

(4) Such payments shall be made available entirely from funds held in the Nuclear Waste Fund established in section 10222(c) of this title and shall be available only to the extent provided in advance in appropriation Acts.

(5) The Secretary may consult with appropriate units of general local government in advance of commencement of construction of any such facility in an effort to determine the level of payments each such unit is eligible to receive under this subsection.

(g) Limitation

No monitored retrievable storage facility developed pursuant to this section may be constructed in any State in which there is located any site approved for site characterization under section 10132 of this title. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository. Such restriction shall continue to apply to any site selected for construction as a repository.

(h) Participation of States and Indian tribes

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

APPENDIX G

Nos. 85-3859, 86-5087/5168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Tennessee,
Petitioner (85-3859)
Plaintiff-Appellee (86-5087/5168),

v.

John Herrington, Secretary of the United States Department of Energy
Respondent (85-3859),
Defendant-Appellant (86-5087/5168)

ORDER

(Filed Jan. 7, 1987)

The State of Tennessee has moved for a stay of the mandate pending application for writ of certiorari to the United States Supreme Court. Unless the mandate is stayed, the important issues of first impression in this case may become moot.

Therefore the motion of appellee-petitioner is granted and the mandate is stayed for thirty (30) days to permit appellee-petitioner to present its petition to the United States Supreme Court. If the petition is filed within thirty (30) days from today, the mandate will continue to be stayed pending decision of the United States Supreme Court on the petition.

The Secretary's motion for immediate issuance is denied.

The State of Tennessee's renewal of motion for stay is also denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

Supreme Court, U.S.
FILED
MAR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1280

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE, PETITIONER

v.

JOHN HERRINGTON, SECRETARY OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DIRK SNEL
J. CAROL WILLIAMS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

1. Whether the court of appeals had original and exclusive jurisdiction over this action alleging that the Secretary of Energy has failed to comply with the requirements of 42 U.S.C. 10161(h).

2. Whether 42 U.S.C. 10161(h) requires the Secretary of Energy to "consult and cooperate" with petitioner prior to receiving authorization from Congress to construct a monitored retrievable storage facility.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8, 9
Crown Simpson Pulp Co. v. *Costle*, 445 U.S. 193 (1980)	8
General Electric Uranium Mgmt. Corp. v. *United States Dep't of Energy*, 764 F.2d 896 (D.C. Cir. 1985)	8
Tennessee v. *Harrington*, No. 3-85-0959 (M.D. Tenn. Feb. 7, 1986)	5
Wisconsin Electric Power Co. v. *Department of Energy*, 778 F.2d 1 (D.C. Cir. 1985)	9

Statutes:

Nuclear Waste Policy Act of 1982, 42 U.S.C. 10121 *et seq.*:	
42 U.S.C. 10121-10171	1
42 U.S.C. 10131-10145	2
42 U.S.C. 10131-10138	6
42 U.S.C. 10131(b)	2
42 U.S.C. 10137(b)	3
42 U.S.C. 10137(b)	10
42 U.S.C. 10137(c)	3, 10
42 U.S.C. 10139(a)	6
42 U.S.C. 10151-10157	2
42 U.S.C. 10151(b)	2
42 U.S.C. 10161	2, 6
42 U.S.C. 10161(b)(1)	2
42 U.S.C. 10161(b)(2)	2
42 U.S.C. 10161(b)(2)(A)	11
42 U.S.C. 10161(b)(3)	2

Statutes – Continued: Page

42 U.S.C. 10161(b)(4) 2
42 U.S.C. 10161(c) 2
42 U.S.C. 10161(c)(2) 2
42 U.S.C. 10161(c)-(e) 10
42 U.S.C. 10161(c)-(h) 2
42 U.S.C. 10161(d) 2
42 U.S.C. 10161(e) 2
42 U.S.C. 10161(f) 3
42 U.S.C. 10161(g) 3
42 U.S.C. 10161(h) 3, 5, 6, 7, 8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1280

STATE OF TENNESSEE, PETITIONER

v.

JOHN HERRINGTON, SECRETARY OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 806 F.2d 642. The opinions of the district court (Pet. App. A26-A42, A43-A75) are reported at 622 F. Supp. 923 and 626 F. Supp. 1345.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1986. A petition for rehearing was denied on December 31, 1986. By order of January 7, 1987 (Pet. App. A88), the court of appeals stayed the issuance of its mandate until February 7, 1987. The petition for a writ of certiorari was filed on February 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In subchapter I of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10121-10171, Congress enacted a comprehensive program for disposing of this nation's

high level nuclear waste and spent fuel. Part A of Subchapter I establishes a program for constructing permanent deep geologic repositories, where high level radioactive waste and spent fuel may be stored permanently. 42 U.S.C. 10131-10145. Part B of the subchapter establishes an interim storage program, where such waste and fuel may be stored on a temporary basis. 42 U.S.C. 10151-10157. And Part C of the subchapter establishes a so-called "monitored retrievable storage" (MRS) program, where nuclear waste may be processed, packaged, and stored pending shipment to a permanent deep geologic repository. 42 U.S.C. 10161.

Parts A and B of Subchapter I actually authorize the Secretary of Energy to begin developing and siting deep geologic and interim storage facilities. See 42 U.S.C. 10131(b), 10151(b). In contrast, Part C merely authorizes the Secretary to "complete a detailed study of the need for and feasibility of, and [to] submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities" (42 U.S.C. 10161(b)(1)).[1] Only if Congress authorizes such an MRS facility may the Secretary actually proceed with development and construction. 42 U.S.C. 10161(c)(2).

In anticipation of such congressional approval, however, Part C further establishes the procedures which the Secretary must follow in developing and constructing such an MRS facility. See 42 U.S.C. 10161(c)-(h). The Secretary must comply with the requirements of the National Environmental Policy Act of 1969. 42 U.S.C. 10161(c). He must obtain a license from the Nuclear Regulatory Commission (NRC). 42 U.S.C. 10161(d) and

---

[1] In formulating this proposal, the Secretary is instructed to consult with the Nuclear Regulatory Commission and the Administrator of the Environmental Protection Agency. 42 U.S.C. 10161(b)(3). Moreover, the statute specifies certain minimum subjects that must be covered and included in the Secretary's study and proposal. See 42 U.S.C. 10161(b)(2), (3), and (4).

(e). He must provide "impact aid" to affected units of local government. 42 U.S.C. 10161(f). He must not construct an MRS facility in any state where a deep geologic repository has been approved for siting. 42 U.S.C. 10161(g). And, for "[a]ny facility authorized pursuant to" this section of the statute, the Secretary must comply with certain provisions applicable to deep geologic repositories, including the requirement that he engage in a statutorily defined process of "consultation and cooperation" with affected states. 42 U.S.C. 10161(h).[2]

2. Following NWPA's passage, the Secretary, pursuant to the directive in Part C of Subchapter I, undertook to study the need for and feasibility of construction of an MRS facility. Pet. App. A5. When completed, the study indicated that construction of an MRS facility would in fact significantly improve the operation of the nation's nuclear waste management system. *Ibid.* The Secretary thus began screening and identifying potential sites on which he could construct an MRS facility. *Ibid.* After comprehensive analysis, the Secretary identified three locations in the State of Tennessee where an MRS facility could be constructed, and specified the Clinch River Breeder Reactor site as the most preferable of the three. *Id.* at A5-A6; see also *id.* at A5 n.4.

---

[2] Specifically, 42 U.S.C. 10161(h) provides that:

> Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

Sections 10137(b) and (c) require the Secretary to engage in a process of "consultation and cooperation" with state and tribal governments directly affected by the siting of a deep geologic repository.

Therefore, on April 25, 1985, the Secretary notified the Governor of the State of Tennessee that he had tentatively determined to recommend to Congress that an MRS facility be constructed in that state. Pet. App. A6. The Secretary advised the Governor that he would finish evaluating the three candidate sites over the ensuing months and submit a final proposal to Congress by January 15, 1986. *Ibid.* He offered to and subsequently did provide the State with funds and technical assistance for evaluating the effects that the proposed MRS facility would have on the locale. *Id.* at A6-A7. Finally, he asked that the State submit to him by July 1, 1985, any comments it might have concerning the tentative MRS proposal so that those comments could be timely analyzed and included in his report to Congress. *Id.* at A7.[3]

3. In August 1985, however, petitioner, the State of Tennessee, commenced this lawsuit in the United States District Court for the Middle District of Tennessee, complaining that, in identifying Tennessee as a candidate for an MRS facility, the Secretary had failed to follow the "consultation and cooperation" process mandated by the statute.[4] Pet. App. A7-A8. Moreover, because the district court's subject matter jurisdiction over this action was in doubt, petitioner filed a petition for review—identical to its complaint in the district court—with the United States Court of Appeals for the Sixth Circuit. *Id.* at A8. In both the complaint and the petition for review, petitioner asked that the Secretary be enjoined from presenting his MRS proposal to Congress. *Ibid.*

---

[3] Tennessee did not officially transmit its position to the Secretary until February 5, 1986. Pet. App. 7A.

[4] Petitioner also alleged that the MRS authorization process is unconstitutional. See Pet. App. A8 n.5. But petitioner did not further pursue this allegation in either of the courts below. See *ibid.*

The district court determined that it had subject matter jurisdiction over the complaint (Pet. App. A26-A42) and that the Secretary had failed to follow the "consultation and cooperation" process mandated by the statute (*id.* at A43-A75).[5] The court found that "the [consultation and cooperation] provisions incorporated in [42 U.S.C. 10161(h)] are capable of application both before and after Congressional authorization" (*id.* at A65), that "Congress clearly intended for the states to play an active role in the MRS siting process" (*id.* at A66), and that, "[i]f the provisions of [42 U.S.C. 10161(h)] were to take effect only after Congressional authorization of an MRS facility, the state's rights to participate in consultation and cooperation procedures * * * would be rendered meaningless" (*id.* at A70). Accordingly, it issued "a declaratory judgment that the provisions of [42 U.S.C. 10161(h)] take effect prior to the time of congressional authorization of the construction of an MRS facility" (*ibid.*) and, subsequently, enjoined the Secretary " 'from making any proposal to Congress or filing any documents with Congress which rely on siting studies developed prior to consultation and cooperation between [the Secretary] and the State of Tennessee' " (Pet. 6 n.5, quoting *Tennessee* v. *Herrington,* No. 3-85-0959 (M.D. Tenn. Feb. 7, 1986)).[6]

4. The court of appeals reversed (Pet. App. A1-A25). It held that original jurisdiction to review the Secretary's actions under the MRS provisions of the statute lies in the appellate courts (*id.* at A11-A17). And it held that the

---

[5] The district court authorized an interlocutory appeal of its jurisdictional ruling. Pet. App. A8. The Sixth Circuit later consolidated that appeal with both the petition for review and the Secretary's appeal from the district court's judgment on the merits. *Id.* at A8, A9.

[6] The Secretary had planned to submit his proposal to Congress, together with petitioner's comments, on February 10, 1986.

Secretary has no obligation to "consult and cooperate" with petitioner since Congress has not yet authorized the construction of any MRS facility (*id.* at A17-A22).

On the jurisdictional question, the court acknowledged that "NWPA's provisions on judicial review are unclear" (Pet. App. A9). The court noted that 42 U.S.C. 10139(a), which gives the courts of appeals original jurisdiction over civil actions alleging that the Secretary has failed to take statutorily required action, on its face applies "only to actions arising under Subchapter I, Part A" (*id.* at A10).[7] But the court further noted that 42 U.S.C. 10161(h) "makes certain sections * * * of Part A dealing with review of site selection and state and Indian tribe participation and consultation in the permanent repository context applicable to MRS facilities as well" (*ibid.* (footnote omitted)), and that "Congress clearly intended that the development of the MRS proposal proceed in as timely a fashion as the development of the permanent repository [process]" (*id.* at A13). Thus, it concluded "that actions arising under section 10161(h) of the NWPA are subject to the judicial review provisions of section 10139," which meant that original jurisdiction lay in the appellate court (*id.* at A17).

On the substantive question, the court found that "none of the provisions listed in section 10161(h), including section 10137(b), [which creates the consultation and cooperation requirement], becomes applicable until the MRS facility has been 'authorized' " (Pet. App. A19).

---

[7] 42 U.S.C. 10139(a) provides, in pertinent part, that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action * * * alleging the failure of the Secretary * * * to take any action, required under this part." Part A, the "part" to which this provision refers, technically encompasses only 42 U.S.C. 10131-10138 (and not 42 U.S.C. 10161).

Therefore, the court noted, "[t]his litigation centers around the meaning of that term" (*ibid.*). But it further found that the "meaning of section 10161(b) * * * is 'susceptible of contradictory interpretations' " (Pet. App. A20 (citation omitted)). While "the word 'authorized' was used in six other instances in section 10161, and * * * in each case it referred to *congressional* authorization of an MRS facility" (*ibid.* (emphasis in original)), the court found that the "legislative history of the NWPA does not reveal the meaning that Congress intended to give 'authorized' " in 42 U.S.C. 10161(h) (Pet. App. A21).

Rather, the court determined, "the Act and its legislative history suggest that Congress had two conflicting goals: it wanted to provide the states with a meaningful role in the development of disposal facilities, but * * * it also wanted to ensure the timely development of an MRS proposal" (Pet. App. A21). "Adoption of the State's position," the court then noted, "would defeat the second goal, though it would further the first" (*ibid.*). Conversely, the court added, the Secretary's interpretation "would further the second goal, while impeding the first" (*ibid.*).

In these circumstances, the court concluded, it must "adopt the [Secretary's] position" (Pet. App. A21). That position rationally furthers the second goal of the statute, to wit, the timely development of an MRS proposal (*ibid.*). Moreover, while that "interpretation does give the State a more constricted role than the State would prefer" (*id.* at A22), it "does not totally deprive the State of its role in the MRS siting process, since the provisions set forth in section 10161(h) will apply when and if Congress approves the MRS facility" (*ibid.*). Thus, mindful of this Court's admonition concerning the deference due an agency's construction of the statute it administers, the court upheld the Secretary's "interpretation of 'authorized' in section 10161(h) as meaning 'authorized by Congress' " (Pet. App.

A22, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).[8]

5. The court then denied petitioner's suggestion of rehearing en banc. See Pet. 8. It agreed, however, to stay issuance of its mandate pending the filing of a petition for a writ of certiorari and the petition's disposition by this Court. Pet. App. A88. Accordingly, the Secretary remains enjoined from transmitting his proposal to Congress.

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first suggests, albeit without argument (Pet. ii, 13), that the court below erred in holding that it had original jurisdiction over this suit alleging a violation of 42 U.S.C. 10161(h). But, as the court below noted (Pet. App. A14), "[t]he provisions listed in section 10161(h) are clearly subject to the original jurisdiction of the courts of appeals when they are being applied to repositories," and "Congress must have intended the same jurisdictional provisions to apply to both permanent repositories and MRS." To hold otherwise would attribute "an irrational bifurcated system" to Congress. (*Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980) (footnote omitted)). Thus, every court that has considered the question has rejected petitioner's position. See *General Electric Uranium Mgmt. Corp.* v. *United States Dep't of Energy*,

---

[8] Judge Wellford concurred in part and dissented in part (Pet. App. A23-A25). He agreed that the court of appeals had original jurisdiction over actions concerning 42 U.S.C. 10161(h). Pet. App.A23, A24. But he believed that interpreting that section to require "consultation and cooperation" only after Congress authorizes MRS development "limits the state to such a restricted role that this interpretation is unreasonable and unacceptable in light of expressed legislative intent and other statutory language" (*id.* at A24-A25).

764 F.2d 896 (D.C. Cir. 1985); *Wisconsin Electric Power Co.* v. *Department of Energy*, 778 F.2d 1 (D.C. Cir. 1985). This Court has no reason to question the unanimous judgment of those courts, particularly in the present case where, because a petition for review was concurrently filed with the court below, only the form of the court's order—and not the substantive result—is affected by that issue.

2. On the merits, petitioner contends (Pet. 9-12) that the court below misapplied the interpretive principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This contention is insubstantial.

In *Chevron*, this Court articulated the standards by which courts should review "an agency's construction of the statute which it administers" (467 U.S. at 842). First, the Court noted, "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" (*id.* at 842-843 (footnote omitted)). If, however, "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute" (*id.* at 843 (footnote omitted)). Rather, the Court admonished, "the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*ibid.*).

The court below followed these principles to their letter. First, it asked whether Congress had directly spoken to the precise question at issue. Pet. App. A20. It determined that Congress has not done so (*id.* at A20-A21), finding that "the meaning of section 10161(h) is * * * 'susceptible to contradictory interpretations' " (*id.* at A20 (citation omitted)). Accordingly, the court asked whether the agency had adopted a permissible answer to the question and

found, on the basis of careful consideration, that indeed the agency had done so (*id.* at A21-A22). This is exactly the analytic process that *Chevron* requires.

Petitioner's claim (Pet. 10) that the court's decision leaves it without meaningful input into the design and implementation of the MRS program is plainly wrong. To begin with, petitioner remains completely free to provide Congress with any information that it deems relevant to the MRS siting process; Congress is the body that will determine whether and, if so, where the MRS program will go forward. Second, when and if Congress authorizes the construction of an MRS facility, petitioner remains free to participate in the environmental impact assessment and nuclear licensing processes. See 42 U.S.C. 10161(c)-(e). Third, when and if Congress authorizes construction of an MRS facility, petitioner remains free to engage in the full consultation and cooperation process described in 42 U.S.C. 10137(b) and (c).[9] Indeed, the only thing petitioner may not do is play a formal editorial role in the development of the Secretary's MRS proposal. While this "interpretation does give the State a more constricted role than the State would prefer" (Pet. App. A22), it simply does not, as petitioner claims, leave the state without opportunity for meaningful input.

Petitioner's claim (Pet. 11-12) that the court's decision ignores a clear legislative intent fully to involve the states in the MRS process prior to congressional authorization is equally unfounded. For one thing, the most reliable in-

---

[9] To be sure, petitioner may not engage in formal "consultation and cooperation" concerning the sites which the Secretary will identify as suitable for MRS construction. But petitioner can "consult and cooperate" *with Congress* concerning whether and where an MRS facility actually should be constructed. This opportunity for consultation and cooperation with Congress is *not* available in the deep geologic repository program (see page 2, *supra*), since Congress has already authorized construction of such a facility and left the siting decision to the Secretary.

dicator of congressional intent is the language of the statute and, as both courts below found, "the word 'authorized' was used in six other instances in section 10161, and * * * each [time] it refer[s] to *congressional* authorization of an MRS facility" (Pet. App. A20 (emphasis in original)). Second, as the court below also found, the "legislative history of the NWPA does not reveal the meaning that Congress intended to give 'authorized' " in 42 U.S.C. 10161(h) (Pet. App. A21).[10] And, finally, the MRS provisions plainly have competing goals: "to provide the states with a meaningful role in the development of disposal facilities * * * [and] to ensure the timely development of an MRS proposal" (*ibid.*). Petitioner's narrow characterization of congressional intent (as being principally concerned with state consultation and cooperation) is inconsistent with the other expressed goal of Congress.

---

[10] Petitioner's citation (Pet. 11 n.11) to the remarks of Sen. McClure does not support its claim that Congress intended that the Secretary would formally consult the state in developing his MRS *proposal*. Sen. McClure directed his remarks to the MRS *program* and, prior to congressional authorization, there simply is no MRS *program*. Rather, the Secretary is to submit a *proposal* concerning "the establishment of a Federal *program* for the siting, development, construction, and operation * * *" of MRS facilities. § 141(b)(2)(A), 42 U.S.C. 10161(b)(2)(A) (emphasis added). Thus, Sen. McClure's comments actually support the Secretary's interpretation that state consultation rights are not triggered until Congress has authorized construction of an MRS facility, pursuant to an approved program.

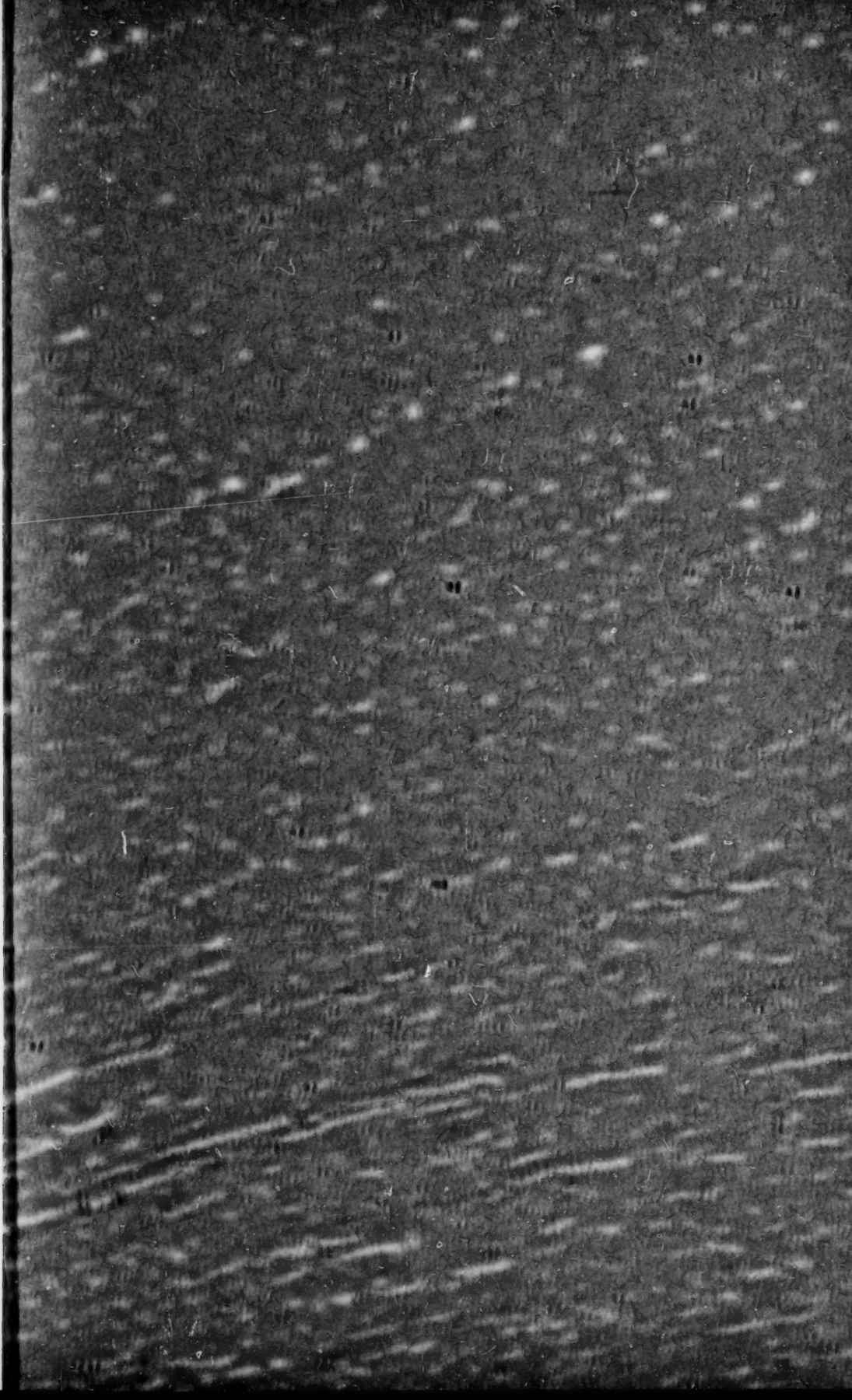
CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
DIRK SNEL
J. CAROL WILLIAMS
Attorneys

MARCH 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40237



Supreme Court, U.S.
FILED
MAR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

vs.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF AMICUS CURIAE

Americans for Clean Energy, Environmental Policy Institute, Natural Resources Defense Council, Natural Rights Center, New England Coalition on Nuclear Pollution, The Sierra Club, Tennessee Environmental Council, Tennessee Nuclear Waste Task Force, and Tennessee Valley Energy Coalition

ALBERT K. BATES

The Natural Rights Center
156 Drakes Lane
Summertown, TN 38483-0090
(615) 964-2334

Attorney for Amici Curiae

TABLE OF CONTENTS

Questions Presented	ii
Introduction	1
Interest of Amici	2
Reasons for Granting the Writ	3
This Case Presents A Significant Misconstruction Of The Nuclear Waste Policy Act Which, If Sustained, Will Impose, In Direct Contravention Of The Will Of Congress, Far-Reaching Limitations Upon The Rights Of States And Affected Localities To Have Fair And Meaningful Participation In Decisions Affecting Local Public Health And Safety.	3
Conclusion	6
Appendix: Statutes In Issue	
Certificate of Service	

TABLE OF CITATIONS

Cases:

Tennessee v. Herrington, 806 F.2d 642, 653 (6th Cir.1986)	4,6

Statutes:

The Nuclear Waste Policy Act of 1982	*passim*
42 U.S.C.§ 10137	3
42 U.S.C.§ 10161(h)	4

Other Authorities:

H.R. Rep. No. 491, 91st Cong. 1st Sess. 1982 *U.S. Code Cong. & Ad. News* 3792	4

QUESTIONS PRESENTED

1. Did the United States Department of Energy (DOE) violate the rights of the State of Tennessee under the Nuclear Waste Policy Act of 1982 (NWPA) in refusing to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a (first-of-its-kind) facility to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants?

2. *When* does the NWPA require DOE to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a nuclear waste storage facility?

(A) Does the NWPA require consultation and cooperation with Tennessee *when* DOE evaluates the suitability of areas in Tennessee for a nuclear waste facility?

Or

(B) Does the NWPA require consultation and cooperation *only* upon completion of DOE's planning process and *after* Congress authorizes site-specific, design-specific plans to construct the facility in Tennessee?

3. In light of the clear congressional mandate that DOE engage in "meaningful" consultation and cooperation with potential host states for proposed nuclear waste storage facilities, did the Court of Appeals misapply *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by deferring to a DOE interpretation of the NWPA that calls for consultation and cooperation with Tennessee only *after* congressional authorization of DOE's proposed site-specific, design-specific plan to construct a facility in Tennessee?

4. Do the District Courts or the Courts of Appeals have original and exclusive jurisdiction over lawsuits arising out of 42 U.S.C. § 10161?

No. 86-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

vs.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF AMICUS CURIAE

Amici environmental and public interest organizations, Americans for Clean Energy, Environmental Policy Institute, Natural Resources Defense Council, Natural Rights Center, New England Coalition on Nuclear Pollution, The Sierra Club, Tennessee Environmental Council, Tennessee Nuclear Waste Task Force, and Tennessee Valley Energy Coalition, respectfully urge that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 25, 1986. The issues presented on review are timely, substantial and of great significance to the amici organizations and to the parties and interests which they represent. Both parties have consented to the entry of this Brief of Amicus Curiae.

INTEREST OF AMICI

Amici Curiae are nine independent, nonprofit, non-governmental, membership organizations concerned with and affected by national nuclear waste management issues.

Americans for Clean Energy is a regional environmental organization concerned with the health and safety of the people of Oak Ridge, Tennessee and its surrounding area. Americans for Clean Energy has offices at Box 77, Kingston, TN, 37763.

The **Environmental Policy Institute** is a nonprofit public interest organization engaged in research, public education, litigation and lobbying. The Institute is actively involved in formulating national and international nuclear waste policy. Organizational headquarters are at 218 D Street SE, Washington DC, 20003.

The **Natural Resources Defense Council** is a nonprofit membership organization dedicated to protecting America's natural resources and to improving the quality of the human environment. The organization's headquarters are at 122 East 42nd Street, New York NY, 10168.

The **Natural Rights Center** is a regional, nonprofit, public interest law project with offices at 156 Drakes Lane, Summertown TN, 38483. The Center actively represents the interests of its members in governmental actions having significant transgenerational implications.

The **New England Coalition on Nuclear Pollution** is a nonprofit membership organization with offices at Box 545, Brattleboro, VT, 05301. The Coalition has actively pursued safe and effective resolution of nuclear waste issues in administrative and court proceedings for the past 20 years.

The **Sierra Club** is a nonprofit organization with 350,000 members dedicated to the preservation of the natural environment. Principal offices are at 530 Bush Street, San Francisco, CA 94108.

The **Tennessee Environmental Council** is a nonprofit association of citizens and organizations dedicated to the conservation of Tennessee's natural resources and protection of the public health. Its 34 organizational members include state and local chapters of the American Camping Association, the American Lung Association, the Audubon Society, Church Women United, the Izaak Walton League, the League of Women Voters, Tennessee Conservation League, Tennessee Forestry Association, Tennessee Recreation and Parks

Association, Tennessee Scenic Rivers Association, and the Wildlife Society. Principal offices are at 1720 West End Ave, Nashville TN, 37203.

The **Tennessee Nuclear Waste Task Force** is a coalition of nine environmental groups in the Southeastern United States having interest and expertise in the proposed transportation and retreivable storage of nuclear waste. The Task Force has offices at Route 6, Box 526, Crossville TN, 38555.

The **Tennessee Valley Energy Coalition** is a statewide nonprofit environmental organization with headquarters at 1407 East Fifth Avenue, Knoxville TN, 37917.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SIGNIFICANT MISCONSTRUCTION OF THE NUCLEAR WASTE POLICY ACT WHICH, IF SUSTAINED, WILL IMPOSE, IN DIRECT CONTRAVENTION OF THE WILL OF CONGRESS, FAR-REACHING LIMITATIONS UPON THE RIGHTS OF STATES AND AFFECTED LOCALITIES TO HAVE FAIR AND MEANINGFUL PARTICIPATION IN DECISIONS AFFECTING LOCAL PUBLIC HEALTH AND SAFETY.

The Nuclear Waste Policy Act (NWPA) includes provisions for State and Domestic Nation participation in the development of monitored retrievable storage (MRS) facilities for commercially generated nuclear waste.[1]

The intention of Congress was to insure that the Department of Energy (DOE) consults and cooperates with states in which there are potentially acceptable MRS sites, in order to resolve all significant concerns regarding health, safety, environmental, and economic impacts. Under the

---

1. 42 U.S.C.§ 10137 provides in relevant part:

> **(b) Consultation and cooperation**
> In performing any study of an area within a State for the purpose of determining the suitability of such area... the Secretary shall consult and cooperate with the Governor and legislature of such State... in an effort to resolve the concerns of such State... regarding the public health and safety, environmental and economic impacts of any such repository.

provisions incorporated by 42 U.S.C. § 10161(h), the Department of Energy is required to notify an affected state within 90 days of *any* study related to identification of a potentially acceptable MRS site.[2]

Failure by DOE to recognize the NWPA process in its extensive site screening and identification studies has eliminated meaningful input by Tennessee during MRS site selection. The district court found that DOE violated the NWPA in refusing to permit state participation in the selection of three candidate sites in Tennessee and enjoined DOE from submitting its "fatally flawed" proposal to Congress. In a split opinion, the Circuit Court adopted DOE's incredible interpretation of the NWPA and ruled that DOE did *not* have to consult and cooperate with Tennessee until *after* Congress had authorized construction of the waste facility.

In her majority opinion, Judge Kennedy reviewed the legislative history of the NWPA and concluded that Congress had two main objectives in mind when creating the processes for siting nuclear waste dumps. The first was meaningful participation by affected states and Native American nations in order to preserve their rights to protect local health and safety. The second objective was timely resolution of the nuclear waste dilemma. In the majority's view, the second objective was preeminent. Where a conflict between the two goals arises, the balance must be struck on the side of speed.

> "Adoption of the State's position would defeat the second goal, though it would further the first. The DOE's interpretation, on the other hand, would further the second goal, while impeding the first. In such an instance, we must adopt the DOE's position."

Tennessee v. Herrington, 806 F.2d 642, 653 (6th Cir.1986).

---

2. State participation was an important subject of debate in Congress during the drafting and passage of the Act. The House Report concluded:

> [P]rior to such time as a site has been approved for licensing and repository construction, states and tribes have rights to receive all relevant information from investigations, to participate in planning of environmental assessments and site characterization activities and to make recommendations regarding other aspects of conduct of the investigations which affect the social and economic well-being of citizens of the state or tribe.

H.R. Rep. No. 491, 97th Cong., 1st Sess. 45, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 3792, 3811.

In actuality, adoption of the State's position would only hinder the second goal (by setting the program back a few months while siting studies were reviewed), while adoption of the DOE's interpretation totally destroys the goal of meaningful state participation (since the State will be allowed input only after Congress has authorized both the site and the design for the facility).

The whole idea of rushing to dispose of nuclear wastes, which the Court of Appeals found to be of overriding importance, is exceedingly unwise. The health hazard created by the byproducts of the nuclear fuel cycle will linger for hundreds of thousands of years, longer than any previous artifact of civilization. Whether these wastes are emplaced this year or next year is almost meaningless on that time scale. The speed objective is mainly for the benefit of the utility companies, which will have to spend less money storing these wastes if DOE will take possession now instead of a year from now.[3] From the standpoint of protecting the public health and the public interest, undue speed is both unwise and unnecessary. Democratic debate and the system of federalism

---

3. Commercial reactor fuel is currently changed about once every three years, and the spent fuel is stored in cooling pools within each reactor's containment dome. The fuel is not changed because it has lost its potency. On the contrary, irradiation within the reactor for three years increases the quantity of transuranic and other fissionable materials, like plutonium, americium, curium, neptunium, and technitium, making the fuel more radioactive, not less. It is removed because it is deemed to be too volatile, too unstable, and too unpredictable to use after three years. Entrapped within the spent fuel's cladding are a number of radioactive gases like krypton, xenon, and radon. Normal stress on the fuel assemblies creates small cracks in the fuel, so that some percent of these gases and metals escape into the water coolant in the spent fuel pools. Filtering of the water and containment air removes many of these radioactive products. The remainder reach the environment surrounding each nuclear plant and are taken up in the food chain where they eventually cause a small but statistically certain amount of cancers, birth defects and ill health in subjected populations. It is Secretary Herrington's proposal to collect 70,000 of these spent fuel assemblies (containing 15,000 metric tons of uranium fuel) at one storage facility in Tennessee where they can be stored in dry casks in an open field until such time as deep geological emplacement is prepared or the consensus, technology and economic incentive exist to extract the plutonium and uranium oxides to make fresh reactor fuel or nuclear warheads.

may consume more time, but should, in the end, produce the best result.

In his vigorous dissent, Judge Harry Wellford defended the clear intention of Congress to provide ample state participation at every stage of the nuclear waste debate. He found his panel's interpretation of the NWPA to require consultation with the state only after formal authorization of the specific site and design was "unreasonable and unacceptable."

As Judge Wellford indicated, the issues in this case run to the very heart of the nuclear waste debate. Will decisions affecting the life or death of millions of people, some of whom will not be born until 1,000 years from now, be decided by democratic processes, or will they be decided by the DOE? Judge Wellford wrote:

> "The decision in this case not only resolves a serious dispute for the State of Tennessee in its efforts to protect its environment and citizens, but will have important ramifications for the whole process of selecting nuclear waste disposal sites in the United States. It represents the first appellate consideration of a substantial portion of the Nuclear Waste Policy Act."

Tennessee v. Herrington, 806 F.2d 642, at 655.

CONCLUSION

For the reasons set forth above, Amici support the arguments of the State of Tennessee and respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

ALBERT K. BATES
Attorney for Amici Curiae

The Natural Rights Center
156 Drakes Lane
Summertown TN 38483
(615) 964-2334

APPENDIX

STATUTES IN ISSUE

42 U.S.C. § 10161:

(h) Participation of States and Indian tribes.

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility. (Pub. L. 97-425, Title I, §141; 96 Stat. 2241)

42 U.S.C. § 10137:

(a) Consultation with States and affected Indian tribes.

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(b) Consultation and cooperation.

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae have been forwarded to the below listed counsel via first-class U.S. Mail, postage prepaid, on this the 4th day of March, 1987:

Hon. John S. Herrington
Secretary of the United States Department of Energy
James Forrestal Building
1000 Independence Ave., S.W.
Washington D.C. 20585

Hon. Charles Fried
Solicitor General
United States Department of Justice
Constitution Ave. & 10th Street N.W.
Washington D.C. 20530

Hon. W.J. Michael Cody
Attn: Frank J. Scanlon
Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025

Albert K. Bates

ALBERT K. BATES
Attorney for Amici Curiae

NO. 86-1280 (4)

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,

Petitioner,

vs.

JOHN HERRINGTON,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF ENERGY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI

Lacy H. Thornburg
Attorney General of North Carolina

H. Al Cole
Senior Deputy Attorney General

Daniel C. Oakley
Special Deputy Attorney General

Counsel for *Amici*

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

LIST OF *AMICI* STATES

STATE OF KENTUCKY

Honorable David L. Armstrong
Attorney General

STATE OF MISSISSIPPI

Honorable Edwin Lloyd Pittman,
Attorney General

Sidney J. Martin,
Deputy Attorney General

Lisa A. Spruill,
Special Assistant Attorney General

STATE OF NORTH CAROLINA

Honorable Lacy H. Thornburg,
Attorney General

H. Al Cole,
Senior Deputy Attorney General

Daniel C. Oakley,
Special Deputy Attorney General

STATE OF OHIO

Honorable Anthony J. Celebrezze, Jr.,
Attorney General

Sharon L. Sigler,
Assistant Attorney General

STATE OF WEST VIRGINIA

Honorable Charlie Brown,
Attorney General

QUESTIONS PRESENTED

1. Did the United States Department of Energy (DOE) violate the rights of the State of Tennessee under the Nuclear Waste Policy Act of 1982 (NWPA) in refusing to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a (first-of-its-kind) facility to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants?

2. When does the NWPA require DOE to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a nuclear waste storage facility?

(A) Does the NWPA require consultation and cooperation with Tennessee when DOE evaluates the suitability of areas in Tennessee for a nuclear waste storage facility?

(B) Or does the NWPA require consultation and cooperation only upon completion of DOE's planning process and after Congress authorizes site-specific, design-specific plans to construct the facility in Tennessee?

3. In light of the clear congressional mandate that DOE engage in "meaningful" consultation and cooperation with potential host states for proposed nuclear waste storage facilities, did the Court of Appeals misapply *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),, by deferring to a DOE interpretation of the NWPA that calls for consultation and cooperation with Tennessee only after congressional authorization of DOE's proposed site-specific, design-specific plan to construct a facility in Tennessee?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI STATES 1

ARGUMENT:

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONTRAVENES THE CONGRESSIONAL INTENT OF THE NUCLEAR WASTE POLICY ACT FOR BROAD AND MEANINGFUL STATE PARTICIPATION IN NUCLEAR WASTE FACILITY SITING PROCESSES AND DETERMINATIONS 3

SUMMARY OF ARGUMENT 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

PAGE

CASES CITED

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3, 6, 7

Tennessee v. Herrington, 626 F.Supp. 1345 (M.D. Tenn. 1986) 6

Tennessee v. Herrington, 806 F.2d 642 (6th Cir. 1986) 3

STATUTES CITED

42 U.S.C. § 7401, *et seq* (1977) 6
42 U.S.C. § 10101, *et seq* (1982) 1
42 U.S.C. § 10132 2
42 U.S.C. § 10132 (b) (1) (A) 2
42 U.S.C. § 10136(a) 2
42 U.S.C. § 10137(b) 3, 5
42 U.S.C. § 10161 5
42 U.S.C. § 10161(h) 5, 6

MISCELLANEOUS

Cong. Rec. S. 15642 (December 20, 1982) 5

H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792 4

NO. 86-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,

Petitioner,

VS.

JOHN HERRINGTON,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF ENERGY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI STATES

The *amici* states, North Carolina, Kentucky, Mississippi, Ohio and West Virginia are interested in the review of this matter by the United States Supreme Court for several reasons. The Nuclear Waste Policy Act, 42 U.S.C. §§ 10101, *et seq* (1982) (NWPA, provides for a comprehensive approach to the management and storage of spent nuclear fuel and high-level radioactive waste in this country, and establishes as one of its focal themes a joint federal/state cooperative system. The individual *amici* states may be-

come integral players in that system, but additionally may experience direct effects from the transportation of wastes to and from the Monitored Retrievable Storage (MRS) facility, which is the subject of this matter. The *amici* states believe that the actions of the Department of Energy (DOE) with regard to determining the appropriateness of a MRS facility in our sister state of Tennessee are not in compliance with the spirit and letter of the NWPA, but equally as important to the *amici,* bode ominously for the future relationship between the states and DOE.[1] The instant case represents the first opportunity for the United States Supreme Court to interpret this important Act, and provides an excellent opportunity for the national ramifications of a narrowly-construed DOE policy of "consultation and cooperation" to be reviewed.

The *amici* states vigorously support the Petition for Writ of Certiorari of the State of Tennessee, and request this Court to exercise its judicial discretion to consider this matter, which involves an issue of obvious importance to the states and the citizens of the nation. The United States Supreme Court review of the interpretation of the NWPA made below is of vital interest to the *amici* states.

---

[1] The State of North Carolina is concerned about this future relationship between the states and DOE since it had two sites under consideration by DOE for possible development of a second repository under 42 U.S.C. § 10132, prior to suspension of that process. The State of Mississippi is equally concerned because the DOE is analyzing two sites within her borders for a nuclear waste repository. One Mississippi site has been designated as a "potentially acceptable site" [42 U.S.C. § 10136(a)] and nominated for site characterization by the Secretary of Energy [42 U.S.C. § 10132(b) (1) (A)], and the other site is under consideration for the second repository. The citizens of these States fully expect meaningful "consultation and cooperation."

ARGUMENT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONTRAVENES THE CONGRESSIONAL INTENT OF THE NUCLEAR WASTE POLICY ACT FOR BROAD AND MEANINGFUL STATE PARTICIPATION IN NUCLEAR WASTE FACILITY SITING PROCESSES AND DETERMINATIONS.

The State of Tennessee has brought forward its Petition for Writ of Certiorari for two reasons, with which the *amici* states are in complete agreement. The decision below, *Tennessee v. Herrington*, 806 F.2d 642 (6th Cir. 1986), (1) erroneously determines key provisions of the NWPA relating to the consultation and cooperation between the states and DOE in such a manner that the underpinnings of the contemplated cooperative mechanism may be seriously eroded, and, (2) erroneously applies the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to frustrate the Congressional intent of NWPA for full state participation.

The NWPA provisions relating to full and meaningful state participation in nuclear waste decision-making are clear, and are of vital importance to the continued viability of the Act and public acceptance of the determinations made thereunder. 42 U.S.C. § 10137(b) provides as follows:

> In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian

> tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

The crucial importance of this process to the entire decision-making matrix for nuclear waste management and storage cannot be understated. Reference to the Legislative History of the Act will bear this out.

> H.R. 3809 as amended by the Committee provides for states or tribes which are "hosts" to sites ied for repositories . . . clear rights and procedures for participation in decisions effecting the sites. . . .
>
> . . . Although the Department [of Energy] will have fundamental responsibilities under the Committee amendment to meet schedules, fully explore sites and develop timely and appropriate information for regulatory proceedings, its responsibilty to respond to and implement all reasonable suggestions of a state or tribe is also considered essential to the orderly implementation of the repository program.
>
> . . . The state or tribe on whose territory a site is located is considered to be the primary governmental participant in the repository program. H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792, 3811-12.

In the instant case, the sections of NWPA involving the MRS facility, 42 U.S.C. § 10161, should not be read with a blind eye to the remainder of the Act. 42 U.S.C. § 10161(h) incorporates by reference the "consultation and cooperation" provisions of the Act, making them specifically applicable to the MRS siting process.[2] 42 U.S.C. § 10161(h) provides as follows:

> Any facilities authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

In the opinion of the Sixth Circuit Court of Appeals, the key word "authorized" is interpreted narrowly to defeat the utilization of the very procedures the section is designed to incorporate. 42 U.S.C. § 10137(b) clearly requires consultation and cooperation *as a part of* any DOE study within a State. To interpret "authorized" in such a manner as to prevent that occurrence is not a required construction of the Act, and leads to the anomalous result facing Tennessee at present. The proposal of the DOE regarding the MRS facility, which triggered the instant litigation, is a *fait accompli* without Tennessee participation. Tennessee has correctly pointed out that its input may be a virtual nullity once Congressional authorization is obtained. The District Court's determination that

---

[2] As the State of Tennessee noted in its Petition, Senator McClure commented on the addition of 42 U.S.C. § 10161(h) to the Act, directly, as follows: "Full state participation is provided for the MRS program in exactly the same way as it is provided in the case of repository sites." Cong. Rec. S. 15642 (December 20, 1982).

> the term 'authorized' in Section 141(h) must assume the meaning advanced by the State referring to a facility 'generally contemplated for study and development by the Secretary and presentation to Congress'.... *Tennessee v. Herrington,* 626 F.Supp. 1345, 1359 (M.D. Tenn., 1986),

is clearly the more appropriate resolution of any ambiguity in the meaning of "authorized." Neither DOE nor the majority opinion of the Sixth Circuit Court of Appeals made an attempt to read 42 U.S.C. § 10161(h) contextually with the remainder of the NWPA. This failure greatly concerns the *amici* states, which must now suspect that DOE will take the opportunity to narrowly interpret key provisions of the Act to the detriment of full State participation. This occurrence is even more likely if the opinion of the Sixth Circuit regarding the applicability of a *Chevron, supra,* analysis to the DOE's construction of NWPA is allowed to stand.

The *amici* states strenuously assert that the Circuit Court misapplied the principle of statutory construction as set forth in *Chevron, supra.* That case involved a review of EPA's air quality regulations regarding the use of the "bubble" concept around a polluting industry. The Court found that there was neither statutory language nor specific legislative intent to define the term "stationary source" as used in the Clear Air Act Amendments of 1977, 42 U.S.C. § 7401, *et seq* (1977); and that the use of the "bubble concept" was a reasonable policy choice for the agency to make, and was entitled to deference.

The instant case can be distinguished from *Chevron.* First, even though the NWPA is arguably ambiguous regarding the timing of MRS consultation and cooperation, the Congressional intent through the legislative history is evident. State participation throughout the

process is firmly established. In *Chevron,* Congress did not squarely address the definition of "stationary source" in either the statute or in the legislative history, but left that issue and other policy decisions to EPA.

Secondly, EPA's interpretation in *Chevron* came after the process of promulgating regulations (with notice and hearing), as opposed to DOE's unilateral decision not to consult and cooperate with Tennessee during the site screening and technology selection process. DOE's position appears to be a post hoc rationalization in response to a law suit rather than a policy considered and promulgated through "informed rulemaking."

The statute requires DOE to consult and cooperate with Tennessee (and other states, if under study for a MRS or repository pursuant to the NWPA). The Congressional intent provides that states should participate. The *Chevron* case was misapplied below, as there is a substantial difference between an agency policy developed through rulemaking and one developed to rationalize neglect of statutory responsibility.

SUMMARY OF ARGUMENT

The *amici* states support the granting of the State of Tennessee's Petition for Writ of Certiorari. This matter should be heard because of the significant questions brought forward concerning the Nuclear Waste Policy Act, an Act of extreme national importance. The interpretations of the Act at issue should be settled by this Court. The decision below renders meaningless a vital component of the Act's delicate mechanism for assuring that sound policy determinations are made--that of a full "consultation and cooperation" process between affected states and the Department of Energy. Further, the decision erroneously allows deference to the Department of Energy's

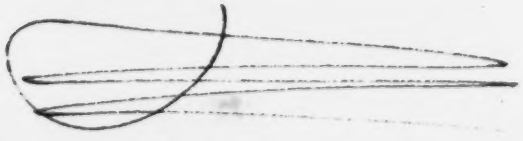
construction of the Act in a situation entirely divorced from more accepted notions of agency expertise.

CONCLUSION

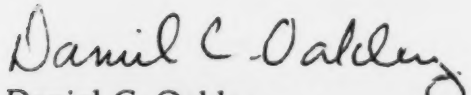
For the reasons set forth above, the *amici* states, North Carolina, Kentucky, Mississippi, Ohio and West Virginia, respectfully request, in support of the State of Tennessee, that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed November 25, 1986.

Respectfully submitted this the 7th day of March, 1987.

LACY H. THORNBURG
Attorney General



H. Al Cole
Senior Deputy Attorney General



Daniel C. Oakley
Special Deputy Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629
919/733-5725

CERTIFICATE OF SERVICE

This is to certify that I have this day served the requisite number of copies of the foregoing BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI on the attorneys of record by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

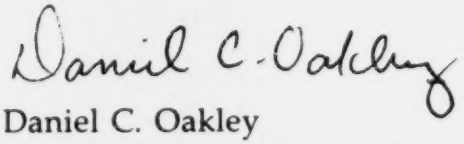
Mr. Frank J. Scanlon
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025

Honorable John S. Herrington
Secretary of the U.S. Department of Energy
James Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Honorable Charles Fried
Solicitor General
United States Department of Justice
Constitution Avenue & 10th Street
Washington, D.C. 20530

This the 7th day of March, 1987.

LACY H. THORNBURG
Attorney General



Daniel C. Oakley
Special Deputy Attorney General
P. O. Box 629
Raleigh, N.C. 27602-0629
919/733-5725

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

v.

JOHN HERRINGTON, Secretary of the United States Department of Energy,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF *AMICI CURIAE* IN OPPOSITION TO CERTIORARI

JAY E. SILBERG, P.C.
Counsel of Record
PAMELA H. ANDERSON
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae, Arkansas Power & Light Company, et al.

March 9, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether, when Congress provided in the Nuclear Waste Policy Act of 1982 for the Department of Energy to consult and cooperate with the states with regard to an *authorized* facility for monitored retrievable storage of spent nuclear fuel, the Department of Energy was required to consult or cooperate with the states prior to authorization by Congress?

2. Whether the Department of Energy's interpretation of the Nuclear Waste Policy Act of 1982 was reasonable and consistent with Congress's expressed intent that consideration of a monitored retrievable storage program proceed expeditiously?

IDENTITY AND INTEREST OF *AMICI CURIAE*

This brief in support of respondent Secretary of the Department of Energy is submitted on behalf of Arkansas Power & Light Company, Baltimore Gas & Electric Company, Boston Edison Company, Carolina Power & Light Company, The Cleveland Electric Illuminating Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Duke Power Company, Duquesne Light Company, Florida Power & Light Company, Indiana & Michigan Electric Company, Iowa Electric Light & Power Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Kansas Gas and Electric Company, Los Angeles Department of Water & Power, Louisiana Power & Light Company, MSU System Services, Inc., Nebraska Public Power District, Niagara Mohawk Power Corporation, Northeast Utilities, Northern States Power Company, Pennsylvania Power & Light Company, Portland General Electric Company, Public Service Company of Colorado, Public Service Electric & Gas Company, Southern California Edison Company, System Energy Resources Inc., The Toledo Edison Company, Virginia Power, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (the "Utilities").

The Utilities are public utilities that provide, or intend to provide, nuclear generated electricity to customers throughout the United States. As a result, the Utilities produce spent nuclear fuel as a necessary by-product of the generation of electricity from nuclear power reactors. Eventually this spent nuclear fuel must be disposed of, in accordance with the provisions of the Nuclear Waste Policy Act of 1982. The Act provides that the Department of Energy shall enter into contracts with producers of spent nuclear fuel, such as the Utilities, for disposal of the fuel commencing in 1998.

The Utilities finance the Department of Energy's storage and disposal of their spent nuclear fuel by paying

the Department of Energy a fee on the kilowatt-hours of electricity that are generated and sold from their nuclear power plants. In addition, the Utilities, at their expense, must provide for the storage of their spent fuel until the Department is able to take delivery of it. For these reasons, the Utilities have a significant interest in ensuring that the Department of Energy's program for the construction of facilities for the storage and disposal of spent nuclear fuel proceeds expeditiously and efficiently, so that such facilities become available in timely fashion without unnecessary cost.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
IDENTITY AND INTEREST OF *AMICI CURIAE*	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
A. Expeditious Review And Implementation Of The MRS Program Was A Congressional Goal And Is Essential In Light Of Recent Developments In The Permanent Repository Program	6
B. Under DOE's Interpretation Of The Act The States Retain Meaningful Participation In The MRS Process	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5
Environmental Policy Institute, et al. v. Herrington, No. 87-7854 and consolidated cases (9th Cir. filed December 18, 1984) 6
General Electric Uranium Management Corp. v. DOE, 764 F.2d 896 (D.C. Cir. 1985) 4
Japan Whaling Association v. American Cetacean Society, —— U.S. ——, 106 S.Ct. 2860 (1986) 5
Nevada v. Herrington, No. 84-7846 (9th Cir. filed December 12, 1984) 6
Tennessee v. Herrington, 806 F.2d 642 (6th Cir. 1986) 4
Tennessee v. Herrington, 626 F. Supp. 1345 (M.D. Tenn. 1986) 4
United States v. Riverside Bayview Homes, Inc., —— U.S. ——, 106 S.Ct. 455 (1985) 5
Utah v. DOE, No. 86-7667 (10th Cir. filed October 2, 1986) 6
Wisconsin Electric Power Co. v. DOE, 778 F.2d 1 (D.C. Cir. 1985) 4

Statutes:

Nuclear Waste Policy Act of 1982,

42 U.S.C. §§ 10101, *et seq.* ..... *passim*
42 U.S.C. § 10222 2
42 U.S.C. § 10131 2
42 U.S.C. § 10134 2
42 U.S.C. § 10136 ..... 8, 10
42 U.S.C. § 10161 ..... 2, 3, 4, 6, 7, 10

Other Materials:

10 C.F.R. Part 961 (1986) 2
128 Cong. Rec. 8525 (1982) 7
S. Rep. No. 282, 97th Cong., 1st Sess. 63 (1981) 7
United States Department of Energy, DOE/RW-0128, *Draft Mission Plan Amendment* (January 1987) 2, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1280

STATE OF TENNESSEE,
Petitioner,

v.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF *AMICI CURIAE* IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

This action arises out of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (the "Act"). The Act provides for the transportation, storage and disposal of spent nuclear fuel and high-level radioactive wastes.[1] The Department of Energy ("DOE") is charged with

---

[1] For purposes of this brief the term "spent nuclear fuel" will be used to refer both to high-level radioactive wastes and spent nuclear fuel.

implementing the Act by 1) providing disposal facilities for spent nuclear fuel and 2) contracting with the owners and generators of spent nuclear fuel for the disposal of those materials in the DOE facilities. § 111 of the Act, 42 U.S.C. § 10131; § 114 of the Act, 42 U.S.C. § 10134; § 302 of the Act, 42 U.S.C. § 10222. The costs of the program are financed through the assessment of a fee against the owners and generators of spent nuclear fuel, including the Utilities. *See, e.g.*, 111(b)(4) of the Act, 42 U.S.C. § 10131(b)(4); § 302 of the Act, 42 U.S.C. § 10222. The Utilities are paying these fees pursuant to contracts that each of the Utilities must enter into with DOE for the transportation and disposal of its spent nuclear fuel. *See* 10 C.F.R. Part 961 (1986).[2]

The main objective of the Act is to provide for the permanent disposal of spent nuclear fuel in deep geologic repositories. The Act sets forth milestones and schedules for meeting this objective. *See* § 111-125 of the Act, 42 U.S.C. § 10131-10145. Not later than January 31, 1998, DOE is to begin disposing of spent nuclear fuel. § 302(a)(5) of the Act, 42 U.S.C. § 10222(a)(5). DOE, however, recently has announced that construction of the first repository will not commence until 1998 and that the facility will not be ready to receive material until 2003. United States Department of Energy, DOE/RW-0128, *Draft Mission Plan Amendment*, (January 1987).

Fortunately, Congress foresaw that the complexity of the permanent geologic repository program could result in delays beyond 1998 and provided in the Act for temporary storage programs. One type of temporary storage facility envisioned by Congress is the monitored retrievable storage ("MRS") facility, which provides a means of safely storing spent nuclear fuel in a readily retrievable form for further processing and/or disposal. § 141 of the Act, 42 U.S.C. § 10161.

---

[2] To date, these fees amount to approximately $2.7 billion and continue to be paid at the rate of over $400 million each year.

Because the concept of an MRS facility was controversial at the time the Act was debated in Congress and because Congress could not predict the need for such a facility, the Act did not authorize the construction of an MRS. Instead Congress directed DOE to submit an MRS proposal to Congress so that Congress could determine, on the basis of full and complete information, whether an MRS should be authorized. § 141(b) of the Act, 42 U.S.C. § 10161(b). The Act required this proposal to include a detailed description of an MRS program including site-specific designs and cost estimates sufficiently detailed to support Congressional authorization and expeditious completion of a facility. § 141(b) of the Act, 42 U.S.C. § 10161(b). Congress also instructed DOE to designate in the proposal at least three alternative sites for construction of an MRS, with DOE's recommendation for the preferred alternative. § 141(b)(4) of the Act, 42 U.S.C. § 10161(b)(4).

DOE attempted to carry out this Congressional mandate by preparing an MRS proposal for presentation to Congress. In April 1985 DOE informed the State of Tennessee of its intention to present a proposal recommending three candidate sites within Tennessee to Congress and provided Tennessee with a draft proposal. At the same time, DOE announced that it intended to present the proposal to Congress in January 1986 and provided Tennessee with opportunities to study, review and comment on the proposal prior to that time.[3]

In August 1985 Tennessee commenced an action in the United States District Court for the Middle District of Tennessee seeking a declaratory judgment that DOE's

---

[3] DOE's steps to involve Tennessee in the decision making process included funding a local task force, which held public meetings and work sessions and visited other nuclear waste management facilities. DOE also provided updated information on the MRS proposal to Tennessee as it became available and offered to present Tennessee's comments to Congress in conjunction with the MRS proposal.

proposed presentation to Congress was prepared in violation of the Act. Tennessee also sought to enjoin DOE from presenting its proposal to Congress. Tennessee objected on the grounds that DOE's proposal allegedly was prepared without consultation and cooperation of states, including Tennessee, which were under consideration as MRS sites and, therefore, allegedly violated the provision in the Act that provides for state participation in the MRS process. DOE's position is that the Act specifically provides for cooperation and consultation with the states with regard to the MRS only after such a facility is "authorized" by Congress. *See* 42 U.S.C. § 10161 (h).[4]

On February 5, 1986 the District Court granted summary judgment in favor of Tennessee. *Tennessee v. Herrington*, 626 F. Supp. 1345 (M.D.Tenn. 1986), Appendix C. of Petitioner at 43.[5] On November 25, 1986 the Sixth Circuit overturned the District Court's decision and ruled in favor of DOE. *Tennessee v. Herrington*, 806 F.2d 642

---

[4] The Act provides for state participation in the MRS process by incorporating into the MRS provision certain provisions for state participation in the permanent repository program. Subsection 141(h) of the Act states in its entirety that:

> [a]ny facility *authorized* pursuant to this section shall be subject to the provisions of section 115, 116(a), 116(b), 116(d), 117 and 118. For purpose of carrying out the provisions of this subsection, any reference in sections 115 through 118 to a repository shall be considered to refer to a monitored retrievable storage facility.

42 U.S.C. § 10161(h) (emphasis added).

[5] The District Court found that it had original jurisdiction to review DOE's activities under the Act. The Sixth Circuit disagreed, holding that exclusive jurisdiction lies in the United States Courts of Appeals. The Utilities agree with the Sixth Circuit's holding on the jurisdictional issue, which is in accord with earlier decisions of the United States Court of Appeals for the District of Columbia Circuit. *General Elec. Uranium Management Corp. v. DOE*, 764 F.2d 896 (D.C. Cir. 1985); *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1 (D.C. Cir. 1985).

(6th Cir. 1986), Appendix A. of Petitioner at 1. The Court ruled that DOE's interpretation of the Act was rational and should be upheld. The Court noted that DOE's interpretation furthers the Congressional goal of speedy resolution of the MRS issue, without depriving the states of meaningful participation in the MRS process. 806 F.2d at 653, Appendix A. of Petitioner at 21-22.

On December 31, 1986 the Sixth Circuit denied Tennessee's Motion for a Rehearing En Banc. On January 7, 1987, however, the Court granted Tennessee's request for a stay of the mandate pending the filing of this Petition. At the present time, therefore, DOE remains unable to present its proposal to Congress.

REASONS FOR DENYING THE WRIT

Review of the Sixth Circuit's decision by this Court is not warranted, because the Sixth Circuit correctly applied the standard for review of an agency decision articulated by this Court in numerous decisions. *See Japan Whaling Association v. American Cetacean Society*, —— U.S. ——, 106 S.Ct. 2860 (1986); *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455 (1985); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). DOE is the agency charged with administering the Act and its interpretation of the Act is entitled to deference and should be upheld unless it is in conflict with the express language of the Act or the express intent of Congress. Deference to DOE as the administering agency is especially appropriate with regard to the Act because the Act establishes time limitations that were deemed appropriate to resolve the critical problem of nuclear waste disposal. Litigation about DOE's interpretation of the Act already has begun to have an impact on those time limits. For instance, DOE currently is defending more than forty lawsuits concerning its recommendations for permanent repository sites. *See, e.g.*,

Nevada v. Herrington, No. 84-7846 and consolidated cases (9th Cir. filed December 12, 1984); *Environmental Policy Institute, et al. v. Herrington*, No. 84-7854 and consolidated cases (9th Cir. filed December 18, 1984); *Utah v. DOE*, No. 86-7667 (10th Cir. filed October 2, 1986).

In the instant case, DOE's interpretation of the Act is consistent with the statutory language and is necessary to effectuate the Congressional goals of efficient disposal of spent nuclear fuel and expeditious consideration of the MRS concept. Moreover, DOE's interpretation provides the states with ample means to participate in the waste disposal process. In contrast, the interpretation proposed by Tennessee is contrary to the explicit wording of the Act and would undermine the utility of the MRS program envisioned by Congress.

A. Expeditious Review And Implementation Of The MRS Program Was A Congressional Goal And Is Essential In Light Of Recent Developments In The Permanent Repository Program

Pursuant to the explicit language of the Act, DOE is required to consult and cooperate with states on MRS decisions only after an MRS facility has been "authorized" by Congress pursuant to § 141 of the Act. 42 U.S.C. § 10161(h). Any requirement for state participation prior to that time would defeat the Congressional goal of expeditious considerations of the MRS.

The Act requires that DOE's proposal for an MRS program contain explicit details including site-specific designs and cost estimates and a recommendation for a site location. These details are intended to provide Congress with sufficient information to authorize an MRS facility, as proposed by DOE, and to allow expeditious completion of any facility so authorized. § 141(b) of the Act, 42 U.S.C. § 10161(b). Clearly, such a detailed plan could not be formulated by DOE without extensive studies of a number of potential locations for MRS facilities.

Indeed, in carrying out its task of preparing an MRS proposal, DOE found it necessary to apply site-screening criteria to sites throughout the continental United States. An increasingly intensive review process was undertaken of the eastern central region of the country, then of thirty-seven locations in twelve states within that region, and finally of eleven sites in six different states before selecting three sites in Tennessee.

The degree of detail that Congress requires in the DOE report does not, however, indicate that Congress intended the MRS process to be inordinately slow. To the contrary, the Act specifies that DOE was to present its proposal to Congress on or before June 1, 1985. § 141(b) of the Act, 42 U.S.C. § 10161, a time frame shorter than that for the permanent repository program.[6] This difference is consistent with Congress's determination that the MRS concept is justified, in part, because the availability of an MRS facility would allow DOE more time to study options for permanent repositories and would provide back-up for delays in the permanent repository program. S.Rep. No. 282, 97th Cong., 1st Sess. 63 (1981) (remarks of Sen. Johnston); 128 Cong. Rec. 8525 (1982) (remarks of Rep. Huckaby). The utility of the MRS facility would be severely diminished if the MRS study, authorization, construction and licensing did not proceed in timely manner so that an MRS facility could be completed well before a permanent repository.

Such a delay would be inevitable, however, if DOE were required to engage in extensive consultation with every state under consideration for a site even before Congress has authorized the MRS. Tennessee claims that the Act requires DOE to negotiate separately with each state where a facility is "generally contemplated for study and development by the Secretary for presentation to Con-

---

[6] DOE was unable to complete the study and proposal by that date. On June 1, 1985 it notified Congress that it planned to submit the proposal in January 1986.

gress." This interpretation, bereft of any support in the language of the Act, would have required DOE to engage in a time-consuming process of consultation and negotiation with virtually every state other than Alaska and Hawaii before it even could begin to prepare its proposal for Congress.[7] This unmanageable requirement would inevitably contribute substantially to delay in the MRS program.

Moreover, delaying the MRS process could have a devastating effect on the entire nuclear waste program. Since the Sixth Circuit's decision in November 1986, the need for MRS facilities as an integrated part of the nuclear waste program has become even more pressing. In January 1987 DOE issued a revised plan for implementation of the permanent disposal process. United States Department of Energy, DOE/RW-0128, *Draft Mission Plan Amendment* (January 1987). According to that revision, construction of a permanent repository will not commence until 1998 and the facility will not be ready to begin receiving spent nuclear fuel from the Utilities until 2003. *Id.* at 5. The current time frame for permanent disposal is thus five years behind that envisioned by Congress when the Act was promulgated. Notably, the delay is occasioned in large measure by problems in the process of state cooperation and consultation. *Id.* at 5, 6.[8]

This delay in the permanent repository program creates a critical situation for Utilities who need to store the spent nuclear fuel produced by their nuclear power reactors. The contracts that the Act requires utilities to enter into with DOE provide that DOE must begin accepting spent nuclear fuel by January 31, 1998. DOE remains

---

[7] At the very least DOE would have been required to negotiate with the twelve states in the preferred region where DOE identified thirty-seven sites.

[8] The Act explicitly provides for consultation and cooperation with the states in considering sites for the permanent repositories. § 116-118 of the Act, 42 U.S.C. § 10136-138. Those provisions are not at issue here.

committed to performing its contractual obligations, but is now relying on its ability to accept waste at an MRS facility by 1998 in order to compensate for the delay in the permanent facility. *Id.* at 5, 10. Consultation and cooperation prior to Congressional authorization with all states studied for the MRS clearly would jeopardize DOE's ability to complete an MRS facility before 1998 and to honor DOE's contractual and statutory commitment to begin disposing of spent nuclear fuel by that date. Thus DOE's interpretation of the state participation provisions in the Act not only is rational, but is necessary to ensure the continued effectiveness of the nuclear waste program.

B. Under DOE's Interpretation Of The Act The States Retain Meaningful Participation In The MRS Process

DOE's interpretation of the Act undeniably limits the degree to which states must participate in the preliminary stages of the MRS process more than Tennessee would like. As the Sixth Circuit held, however, "[i]t does not totally deprive the state of its role in the MRS siting process." 806 F.2d at 653, Appendix A. of Petitioner at 22.

Indeed, Tennessee already has had significant participation concerning the MRS. DOE solicited comments from Tennessee and provided Tennessee with current information about the developing MRS proposal. DOE also offered Tennessee financial assistance. To date, Tennessee has had almost two years since DOE published its draft proposal, in April 1985, and well over one year since DOE completed its proposal in December 1985, to study and comment on the plan. Tennessee obviously will have further opportunities to participate, such as the ability to participate in Congressional consideration of the DOE proposal, including the submission of comments on the proposal. When and if Congress approves the MRS proposal and authorizes an MRS facility, the state in which the facility will be located will have in-

put into a number of key issues through the consultation and cooperation process required for authorized MRS facilities. These issues include, but are not limited to, concerns relating to construction, the environment, public health and safety, operations and transportation. DOE would be required to consult and cooperate with the state on all of these issues and to attempt to enter into an agreement with the state. Furthermore, the Act provides that funds would be provided to the state to mitigate the impact of construction and operation of the facility. § 141(f) of the Act, 42 U.S.C. § 10161(f).[9] Finally, if Congress authorizes the MRS, the state may participate in the licensing proceeding for the facility before the Nuclear Regulatory Commission, and in the preparation of any environmental impact statement. § 141(c)(2) and (d) of the Act, 42 U.S.C. § 10161(c)(2) and (d).

This clearly would constitute substantial state involvement in the MRS process, without contravening the Congressional intention that the MRS proposal be presented as soon as possible. Thus DOE's interpretation strikes an appropriate balance between the need for efficiency and expediency and the need for state participation in the process. In sum, it is reasonable and should be upheld.

---

[9] Significantly, no funds were authorized for review of a *prospective* site; such payments are to be made only "upon receipt by the Secretary of *congressional authorization* to construct a facility." § 141(f) of the Act, 42 U.S.C. § 10161(f) (emphasis added). This limitation on the use of federal funds does not apply to the permanent disposal facilities; funds are provided for states being *considered* as a permanent repository site. § 116(c)(1)(A) of the Act, 42 U.S.C. § 10136(c)(1)(A).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAY E. SILBERG, P.C.
Counsel of Record
PAMELA H. ANDERSON
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae, Arkansas Power & Light Company, et al.

Dated: March 9, 1987.